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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 LUIS PINEDA, et al.,

4 Plaintiffs,

5 v.

15 CV 3774 (GBD)

6 FRISOLING, INC., et al.,

7 Defendants.

8 -----x
9 New York, N.Y.
10 January 3, 2017
11 10:50 a.m.

12 Before:

13 HON. GEORGE B. DANIELS,

14 District Judge

15 APPEARANCES

16 MICHAEL FAILLACE & ASSOCIATES PC
17 Attorneys for Plaintiffs
18 BY: GERRALD ELLIS

19 EUGENE DAVID KUBLANOVSKY
20 Attorney for Defendants

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1 (Case called)

2 THE LAW CLERK: Will the parties please stand and make
3 their appearances, beginning with the plaintiff.

4 MR. ELLIS: Good morning, your Honor. Gerald Ellis,
5 with Michael Faillace & Associates, for plaintiffs.

6 THE COURT: Good morning, Mr. Ellis.

7 MR. KUBLANOVSKY: Good morning, your Honor. Eugene
8 Kublanovsky, of Kublanovsky Law, for the defendants.

9 THE COURT: Good morning, Mr. Kublanovsky.

10 There's a motion pending. It has to do with who's the
11 employer. I have three people. Let me first turn to you,
12 Mr. Ellis, before I hear from Mr. Kublanovsky.

13 Is it still your position that Costanzo, Peter and
14 Maria are all employers?

15 MR. ELLIS: It's our position that Peter and Maria are
16 employers. We're willing to dismiss Costanzo.

17 THE COURT: All right, so we don't have to argue about
18 Costanzo.

19 Then let me turn, Mr. Kublanovsky, to you. Is it your
20 position that neither one of these people are employers?

21 MR. KUBLANOVSKY: It is our position that that is the
22 case. Certainly before the patriarch of the family died --
23 your Honor, I can go through the facts if you want.

24 THE COURT: You can go through them briefly. I think
25 I pretty much understand it. The patriarch of the family died,

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1 Peter took over?

2 MR. KUBLANOVSKY: Correct. And that's essentially the
3 argument.

4 THE COURT: I guess Peter is at least the employer for
5 the period of time after his father died?

6 MR. KUBLANOVSKY: I think we would have a more
7 difficult time arguing -- at least that after he took over, as
8 of April 20th, 2014, that he assumed certain of the duties.
9 That said, as we state in our papers, that he assumed the same
10 responsibilities in carrying out those responsibilities as his
11 father undertook for 24-some-odd years, so it took him about a
12 year of six or so months following what his father had
13 continued doing at the restaurant until he actually understood
14 what his father had done.

15 The basis of our case, your Honor, is that prior to
16 Peter taking over from his father, he was an employee of the
17 restaurant and assisted his father, as did Peter's sister, as
18 employees.

19 THE COURT: Well, that doesn't give me a basis to
20 dismiss him from the case.

21 MR. KUBLANOVSKY: I think, taken into --

22 THE COURT: He is currently the employer?

23 MR. KUBLANOVSKY: Yes, sir.

24 THE COURT: And he's been the employer since his
25 father died?

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1 MR. KUBLANOVSKY: Yes, sir.

2 THE COURT: And part of this lawsuit is suing for a
3 period of time after his father died?

4 MR. KUBLANOVSKY: Yes, sir.

5 THE COURT: So he was the employer. So he doesn't get
6 to go home. He's still a defendant in this case.

7 MR. KUBLANOVSKY: I think it would certainly be harder
8 to argue, although to be perfectly candid, your Honor, that he
9 would escape liability.

10 THE COURT: If I limit a judgment, I don't know at
11 this point, but I'm not sure that I need to get in and try to
12 narrow that issue at this point. I'm just trying to figure out
13 whether he is a legitimate defendant, not the extent of his
14 liability. It seems to me that there's not much of an
15 argument, as you say, candidly, to be made that, at least after
16 the father died -- if there's an argument to be made that the
17 evidence will demonstrate at a trial that he had a different
18 role before his father died but it seems to me that's a factual
19 question because I don't know how active the father was at what
20 period of time and at what point the father was ill and at what
21 point he handed over the responsibilities that would have
22 tipped it to employer.

23 Is it your position that he was never the employer
24 before the father died?

25 MR. KUBLANOVSKY: Yes, absolutely, and that is

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1 undisputed. And we have some affidavits, including by a
2 current employee that has been there for over 20 years, that
3 has worked with all the plaintiffs and has worked with both
4 Peter and Maria and the patriarch of the family, Renato, who
5 had said as much, that Peter was not an employer, it was the
6 father that had total control at all times, of all
7 management responsibilities and all employment
8 responsibilities.

9 THE COURT: And what --

10 MR. ELLIS: Your Honor, if I may, it's absolutely
11 disputed that he was an employer before that. It's not
12 undisputed.

13 THE COURT: So what is the period of time that we're
14 talking about? What is the employment period of time at issue
15 here? When to when?

16 MR. KUBLANOVSKY: The employment period of time that
17 the plaintiffs --

18 THE COURT: Yes.

19 MR. KUBLANOVSKY: I'm sorry, just so I understand the
20 question, the period of time that my clients were employers or
21 the period of time that the plaintiffs were employed?

22 THE COURT: The period of time that the plaintiff is
23 suing for.

24 MR. KUBLANOVSKY: It would be the six years prior to
25 February 7, 2015, I would imagine, February 7, 2015, being the

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1 day that they walked out of the restaurant.

2 THE COURT: February 7, 2015, and they worked six
3 years, at least six years?

4 MR. KUBLANOVSKY: Some of them worked at least six
5 years. I believe one of the plaintiffs only worked about a
6 year.

7 THE COURT: All right. So we have one plaintiff and
8 that would be who, Pineda? Who goes back to February 7th of --
9 2009, is that six years?

10 MR. KUBLANOVSKY: I believe that's correct, your
11 Honor.

12 THE COURT: Who is the plaintiff who's suing for that
13 entire period of time?

14 MR. KUBLANOVSKY: I believe it would be
15 Mr. Guayllasac --

16 THE COURT: Okay.

17 MR. KUBLANOVSKY: -- Mr. Arizmendi, I believe
18 Mr. Diaz.

19 THE COURT: Okay. So maybe --

20 MR. KUBLANOVSKY: I think four out of the five at
21 least go back six years. I believe only one -- Mr. Ellis can
22 correct me -- worked there less than one year, because that was
23 the only individual that was actually hired by Peter after he
24 assumed control of the restaurant.

25 THE COURT: When did the father die?

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1 MR. KUBLANOVSKY: On April 20th of 2014.

2 THE COURT: April 20th, 2014?

3 MR. KUBLANOVSKY: Correct.

4 THE COURT: Okay. On what basis do you want me to
5 conclude -- and then we'll go to Maria -- on what basis do you
6 want me to conclude that Peter -- what responsibilities didn't
7 he have prior to April 20th of 2014 that you say would not make
8 him personally liable for wages?

9 MR. KUBLANOVSKY: I believe, both under the test under
10 New York Labor Law as well as the FLSA, they both apply the --

11 THE COURT: I'm sorry, Mr. Ellis, could you just move
12 over that chair so I can see?

13 MR. ELLIS: Sure.

14 MR. KUBLANOVSKY: -- they both apply the economic
15 reality test. And under that test, as your Honor knows, some
16 of the considerations -- whether the employer had the ability
17 to hire and fire employees, how they supervised, controlled the
18 employee work schedules and conditions of employment,
19 determined the rate of pay and how they were paid, and whether
20 they maintained employment records -- both Peter and certainly
21 Maria, definitely Peter, did not have any of these
22 responsibilities. They solely laid with their father. It took
23 Peter, as I mentioned, approximately six months just to figure
24 out how his father ran the restaurant.

25 Even with respect to payroll -- that was an

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1 interesting disputed fact, that Peter and/or Maria paid the
2 plaintiffs -- they did not pay the plaintiffs. What they did
3 was they took an envelope of wages, that was calculated by
4 their father, and distributed them when their father was busy
5 working at the restaurant and they were the ones on the floor
6 and they were the ones helping to clean up. So, at times maybe
7 they were the couriers but they did not calculate or set wages.
8 They did not set, obviously, the work schedules. That was
9 solely within the control of their father.

10 THE COURT: So what was Peter's job?

11 MR. KUBLANOVSKY: Peter helped in the kitchen, he
12 helped as a host when it was --

13 THE COURT: Was he an employee?

14 MR. KUBLANOVSKY: He was an employee, yes, he was paid
15 a wage, but he received the same envelope of wages, as did
16 Maria, from their father. And they did not supervise any of
17 the employees because that was their father's responsibility
18 and their father supervised them as well as the employees.

19 THE COURT: So what --

20 MR. ELLIS: Your Honor, if I may --

21 THE COURT: No, just a second. I want to keep my mind
22 straight here.

23 What is it that you say transformed Peter into the
24 employer when his father died?

25 MR. KUBLANOVSKY: I think certainly it had to be the

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1 taking over the restaurant and assuming control --

2 THE COURT: How does he take over the restaurant? No
3 employee has the right to just say, okay, the owner of the
4 restaurant just died, I'm taking over the restaurant.

5 MR. KUBLANOVSKY: True.

6 THE COURT: He obviously had to have been in some
7 position where he was presumptively the person who was going to
8 direct the activities on behalf of the father. It's sort of --
9 this isn't Vito Corleone and Michael. Vito gets killed and
10 Michael is automatically the godfather. Somehow he doesn't get
11 transformed into the employer because he decides he wants to
12 step up and take over the restaurant.

13 MR. KUBLANOVSKY: While not as dramatic, your Honor,
14 quite honestly, that is in truth what happened. I don't want
15 it to make light of it.

16 THE COURT: But none of the plaintiffs were in a
17 position to do that. They couldn't compete with him for doing
18 that. He had to have some authority, to begin with, that
19 made him presumptively the person who was going to be the
20 employer when the father had nothing to say about it.

21 MR. KUBLANOVSKY: And I think with the key word being
22 the father. This was a family-run restaurant for 20 years and
23 Peter had worked there since 1993, about one year after it
24 opened. So if anyone was going to take over, it would be
25 Peter.

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1 Now --

2 THE COURT: Well, why is that so? Tell me, what would
3 legally make Peter the employer or legally give him the right
4 to take over the restaurant? Simply because he's related to
5 the owner?

6 MR. KUBLANOVSKY: I don't think it would be simply
7 because of that, but that gave him certainly the wherewithal,
8 and I believe that was his father's intentions, that his family
9 would take over. And the reason --

10 THE COURT: Which family?

11 MR. KUBLANOVSKY: That the Migliorinis would continue
12 running -- the "Migliorinis" being his father, his --

13 THE COURT: But you're making a distinction between
14 Maria and Costanzo and Peter?

15 MR. KUBLANOVSKY: I am.

16 THE COURT: So how is it that Peter becomes the
17 employer and Maria and Costanzo don't become the employer?
18 Because their status that you have just given me is exactly the
19 same as his; they're family members.

20 MR. KUBLANOVSKY: From a legal perspective, your
21 Honor, this was a corporate entity doing business as Piccolo
22 Angolo -- that was the name of the restaurant -- and by virtue
23 of that, they did have some corporate formalities in place.
24 The elder Mr. Migliorini, Renato Migliorini, owned a 50 percent
25 interest in the corporation.

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1 THE COURT: So what makes Peter the boss?

2 MR. KUBLANOVSKY: Well, his son and daughter owned
3 25 percent each.

4 THE COURT: Well, you wouldn't argue that makes him
5 the employer?

6 MR. KUBLANOVSKY: I would not argue that solely makes
7 him the boss, no, but that, coupled with the fact that he was
8 in the kitchen, that he was playing various duties in the
9 restaurant, that also his father had maintained --

10 THE COURT: Employer duties?

11 MR. KUBLANOVSKY: Not employer duties.

12 THE COURT: Well, then --

13 MR. KUBLANOVSKY: The distinction I'm trying to
14 make -- it's an important one, your Honor --

15 THE COURT: Right.

16 MR. KUBLANOVSKY: -- because he was on the floor of
17 the restaurant and he knew certainly how the kitchen
18 functioned, he knew how the host functioned, he knew how the
19 waitstaff functioned, because he ran those duties from an
20 employee perspective. From a managerial perspective, they
21 wanted to keep the restaurant going. It was his father's
22 life's work and he grew up in the restaurant. He took over.

23 It was just a family assumption that Peter would be
24 the one that would be able to run the restaurant and,
25 hopefully, keep it operational, which he has been able to do

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1 with great difficulty. That's why I said it was not as
2 dramatic as the Vito Corleone example but it's a very small,
3 tight Italian family in a restaurant, that's probably no bigger
4 than the jury box. It was assumed that Peter would have the
5 wherewithal. He was the one that would be best positioned, and
6 so that's the position he put himself in.

7 THE COURT: From the way it's characterized, would it
8 be unfair to say that when -- I forget the father's name.

9 MR. KUBLANOVSKY: Renato.

10 THE COURT: -- when Renato was not around, people took
11 orders from Peter?

12 MR. KUBLANOVSKY: They took orders from Peter via his
13 father. This is very important to understand.

14 THE COURT: Suppose the father wasn't around?

15 MR. KUBLANOVSKY: The father was around almost all the
16 time. He practically lived in the restaurant. And the times
17 that he was not -- especially when he got ill, he was not
18 around then -- Peter would go to his bedside, literally take
19 the orders for the day, and carry them back.

20 THE COURT: I know, but if there was a decision that
21 had to be made, that had to be made on the spot, and the father
22 wasn't there, Peter would make that decision?

23 MR. KUBLANOVSKY: Peter would make the decision,
24 certainly, but he would table any decision regarding the
25 management or payroll or any of that, any of those indicative

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1 characteristics under the economic reality test. That's why
2 it's important to recognize the limitations on Peter's
3 authority, because they were solely with respect to what he was
4 comfortable in deciding.

5 THE COURT: Well, where were those limitations? I
6 don't understand. Who put limitations on his authority?
7 What's the evidence that Renato put any limitations on Peter's
8 authority when Renato was not around? If I'm the waiter and I
9 decide I don't like a customer and I punch the customer in the
10 face, you're telling me that Peter wouldn't have the authority
11 to dismiss that employee --

12 MR. KUBLANOVSKY: Absolutely not.

13 THE COURT: -- or at least send that employee home for
14 the day? He could do nothing?

15 MR. KUBLANOVSKY: He would be able to say, you know,
16 you're going to have to talk to my father, which is exactly
17 what he did, and that's an interesting example.

18 THE COURT: What about a decision that had to be made
19 on the spot, where the father was not available? You're not
20 saying that anybody else made those decisions other than Peter?

21 MR. KUBLANOVSKY: I'm not saying that anyone else ever
22 made -- if any decision like that would have been made, yes,
23 Peter would have made it but I'm not saying Peter made them.
24 And that's what's important here.

25 THE COURT: Well, what's important, though, is that

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1 even if you say to me that the father, when he was around and
2 available, made 90 percent of the decisions, I'm trying to
3 figure out who made the 10 percent of the decisions when he
4 wasn't available and wasn't around. If that's Peter, which it
5 appears to be, then Peter's father can be the owner and
6 proprietor and ultimately also the employer but that doesn't
7 disqualify Peter as being also an employer.

8 MR. KUBLANOVSKY: I see the comparison you're making.
9 Let me put it in a different framework, your Honor, and I was
10 thinking about this on my way over. I clerked for a judge a
11 long time ago, for a very brief spell, and it was certainly a
12 terrific experience but the person who had obviously the final
13 say in that relationship was the judge, something I don't have
14 to explain, your Honor. Certainly I could carry out the
15 judge's will and give my impressions and try to assist but I
16 did not have final say.

17 THE COURT: I know, but that's a different
18 relationship. I was out a couple of days last week. You're
19 absolutely right, that's the relationship I have with my
20 clerks: They make no decisions. I don't put that
21 responsibility on them, I don't let the lawyers try to put that
22 responsibility on them. Even if I'm at home, sitting at home
23 eating Christmas dinner -- it probably wouldn't be on Christmas
24 that it would happen, but even if I'm not in the office, even
25 if I'm out of the state, they will email me or they'll pick up

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1 the phone and say the lawyer would like X, should I say yes or
2 should I say no? That's a different kind of authority. They
3 don't have the authority to say, well, you know, the judge is
4 not around so I think it sounds good to me, why don't you go
5 ahead and do it.

6 And I assume you didn't have that authority either as
7 a law clerk. But Peter did have that authority. It appears
8 that if a decision had to be made on the spot, Peter would not
9 be in a position to say, okay, we're going to have to shut down
10 the restaurant for the rest of the day because I can't make
11 this decision because I can't get a hold of my father.

12 MR. KUBLANOVSKY: Actually, your Honor, that --

13 THE COURT: Maybe it is.

14 MR. KUBLANOVSKY: That did in fact occur --

15 THE COURT: Oh, I'm sure --

16 MR. KUBLANOVSKY: -- because that was exactly the
17 relationship. His first call, if for some reason his father
18 wasn't around -- and I would say it was probably 1 percent
19 where he wasn't around, but let's for the sake of this argument
20 say there was that 1 percent where he wasn't around -- Peter's
21 first call was to his father. He would literally go to his
22 father if he could.

23 THE COURT: And if his father wasn't available?

24 MR. KUBLANOVSKY: I don't know if that was ever the
25 case. So I'm --

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1 THE COURT: Well, you've got to give me that. If you
2 can't --

3 MR. KUBLANOVSKY: I am, your Honor. That's why I'm
4 trying to --

5 THE COURT: If you can't give me that scenario, that
6 the father was always available to make every single decision
7 on the spot, no matter where he was, what physical condition he
8 was in, and no matter what the issue, then the person who's at
9 the restaurant who has the authority in his absence to do that
10 is the employer.

11 MR. KUBLANOVSKY: The authority, I'm trying to
12 explain, your Honor, is a divided one. There's a difference
13 between having that supervisor being in control and determining
14 payroll. Hiring, firing, making all those decisions, was never
15 within Peter's sphere of responsibility. He did not execute
16 any of those responsibilities. It wasn't just within the
17 sphere; he did not do that when his father was alive, he just
18 didn't.

19 THE COURT: If the father wasn't available and the
20 waiter came to Peter and said, the couple at table six, they
21 want a glass of our most expensive wine, we haven't opened that
22 bottle, should I open the bottle and give them one glass or
23 should I not open the bottle and give them one glass? I
24 assume -- and you can tell me differently -- that Peter would
25 have to make that decision and he wouldn't say, well, tell them

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1 to come back tomorrow when the boss is here and we can let them
2 know whether they can have a glass of wine. He's going to make
3 the decision and if something happens between the employers and
4 some managerial decision has to be made and the father is not
5 available to make that immediate decision, from your papers and
6 what I hear from you saying, it's that Peter would have to make
7 that decision or he would have to say that decision cannot be
8 made. But I don't see anyplace here where it says where the
9 father wasn't available, that Peter didn't have the authority
10 to make that decision. For example, you said to me -- and I
11 think the papers explain it too -- although the father died, I
12 think, on April 20th?

13 MR. KUBLANOVSKY: Yes.

14 THE COURT: The father died on April 20th, there was a
15 period of time where he was incapacitated, that he was not at
16 the restaurant running the restaurant.

17 MR. KUBLANOVSKY: Right.

18 THE COURT: And that may have been even a period of
19 months.

20 MR. ELLIS: Years, your Honor.

21 MR. KUBLANOVSKY: It was months, it was months. But I
22 want to get back to that, your Honor. I wanted to address that
23 because I don't have to -- we don't have to certainly work in
24 a -- for illustrative purposes, create a fiction. There was in
25 fact, as your Honor just said, a time when Peter's father was

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1 in the hospital. Peter, every morning and each night, would go
2 to the hospital and get -- that's what I was talking about
3 before -- he would talk to his father, talk about who would be
4 paid what, and what are we ordering, what are we doing, and
5 what should I tell --

6 THE COURT: But he would have to go to the restaurant
7 and execute all of that?

8 MR. KUBLANOVSKY: He would.

9 THE COURT: He would have to give orders to the
10 employees to execute all of that?

11 MR. KUBLANOVSKY: Yes, he would have --

12 THE COURT: And if the employee said, you know what, I
13 don't like your idea, I'm not going to do it, he has the
14 authority to say to them, well, if you don't do it, go find
15 yourself another job?

16 MR. KUBLANOVSKY: No, he could not do that.

17 THE COURT: I'm sure he didn't do that but --

18 MR. KUBLANOVSKY: He could not do that. And because
19 he knew, as long as his father was alive, his father called the
20 shots. His father had complete control and he would have to go
21 back to his father to get a decision, especially as to those
22 crucial points.

23 THE COURT: Are you saying that that's the
24 circumstance right until the day he died or that was the
25 circumstance before he died, when he was physically and/or

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1 mentally incapacitated before he died?

2 MR. KUBLANOVSKY: He was physically incapacitated and
3 he was in the hospital and up until the point he died, that is
4 exactly the procedure they followed.

5 THE COURT: He was in the hospital for how long?

6 MR. KUBLANOVSKY: I believe it was several months. I
7 forget the exact period but several months.

8 THE COURT: When you say several months, what do you
9 think that means?

10 MR. KUBLANOVSKY: I think more than three.

11 THE COURT: Three to six months?

12 MR. KUBLANOVSKY: I think that's fair. I think it's
13 closer to three but I just don't have the exact date when he
14 went into the hospital.

15 THE COURT: He was hospitalized for at least three or
16 more months before he died, at which point he never returned to
17 the restaurant?

18 MR. KUBLANOVSKY: That I don't know as a factual
19 matter. I don't know if he was discharged at any point. I
20 know for certain the last month before he died he was in the
21 hospital the entire time, I believe.

22 THE COURT: Who was running the business while he was
23 in the hospital before he died? Peter, I assume?

24 MR. KUBLANOVSKY: When your Honor says running the
25 business, do you mean --

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1 THE COURT: I mean in any way you want to mean it.

2 MR. KUBLANOVSKY: The way Peter -- in actuality, the
3 way it happened was that Peter would go to his father to see
4 who would get paid, what would be the wages, how would the day
5 run while his father was in the hospital.

6 THE COURT: And he would do that on a daily basis?

7 MR. KUBLANOVSKY: He would do that on a daily basis.
8 And he would be in contact with his father, and he would go and
9 he would execute the orders from his father.

10 THE COURT: But that arrangement wouldn't necessarily
11 exclude him as the employer legally, simply because the father
12 gave ultimate directions as the proprietor. That's not the
13 difference between employer and not an employer. Supervisory
14 personnel can be employers; they don't have to be the one who
15 owns the restaurant.

16 MR. KUBLANOVSKY: You're right, your Honor, but here
17 it was orders being communicated in the shape and form and they
18 were communicated for 20 years directly from Peter's father.

19 THE COURT: How do I know that? How do I determine
20 that on this record? That's not what the other says. The
21 others say the father wasn't around, Peter and others were
22 giving us directions, paying us, supervising us. They dispute
23 the nature of the relationship that you claim that was going
24 on. I'm not sure it's much in dispute because somebody had to
25 play that role. I mean they weren't -- I assume it wasn't --

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1 well, I don't know, I don't have any evidence that anybody
2 said, well, I want a raise and Peter said, I've got to go ask
3 my father. Maybe that happened, but other than the ultimate
4 decisions of hiring and firing, I'm not sure what other
5 responsibilities, decisions, you're saying Peter didn't have
6 the authority to make while he was managing the restaurant,
7 because he was clearly managing the restaurant.

8 MR. KUBLANOVSKY: I think he was at the restaurant --
9 if we're talking about the period when his father was ill --

10 THE COURT: Right.

11 MR. KUBLANOVSKY: -- he was helping take care, as a
12 custodian of the restaurant, making sure nothing fell apart.

13 THE COURT: Well, he was more than a custodian, he was
14 running the restaurant. I mean he is the one there making sure
15 you had waiters, making sure you had the right food, making
16 sure that the business was run appropriately, making sure the
17 customers were happy. Everybody looked to him, from your
18 description, as the person who was now the person running the
19 restaurant because the father was no longer in a position to do
20 so.

21 MR. KUBLANOVSKY: I think what's key, that we haven't
22 addressed here, your Honor, is that the other employees,
23 especially the employees in the kitchen, and a number of them,
24 had been working there for many, many years. The cook, we
25 maintain, was an exempt employee, ran the kitchen, so Peter

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1 didn't have to worry about certain parts of the kitchen because
2 that was taken care of. He didn't have to worry about certain
3 parts of the waitstaff. The waiter was there, like Peter was.

4 And the waiter, Mr. Ortiz, did submit an affidavit.
5 And there is, I believe, evidence in the record, based on his
6 affidavit, that supports the roles, that I have been trying to
7 describe, that Peter held versus his father and what authority
8 Peter's father had versus, I would say, the authority that
9 Peter had and that Mr. Ortiz says that in his 20 years at the
10 restaurant he worked very closely with all the plaintiffs, with
11 Peter and with Renato, and Renato was the one that gave all the
12 directions, Peter was not.

13 So we don't just have --

14 THE COURT: But that's not what any of the plaintiffs
15 say. I have to look at the papers again -- I read them a while
16 back -- but I don't have any statement by the plaintiffs that
17 they even had a conversation with Renato. They say that the
18 other family members supervised them, that the other family
19 members gave them their check, that they had day-to-day contact
20 with other family members other than the patriarch of the
21 family, they say that they were disciplined by others, they say
22 they were supervised by others, including Peter, they say they
23 were paid by others, including Peter. They don't ever say, for
24 any portion of the time that's at issue, that Renato was the
25 one who had that kind of contact.

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1 Did I miss something? What is the nature of what they
2 say the relationship was with Renato that you say would exclude
3 Peter as the employer?

4 MR. KUBLANOVSKY: Well, I would cast doubt on some
5 parts of the affidavits, most notably, Mr. Pineda's affidavit.
6 He also says that Mr. Costanzo Migliorini -- it is not true
7 that he did not supervise or control --

8 THE COURT: I'm sorry, say that again.

9 MR. KUBLANOVSKY: That Costanzo Migliorini, the uncle
10 who they dismissed today, we have maintained had no role after
11 2005. Mr. Pineda's own affidavit says, "From 2000 to 2014,
12 Renato and Mario Costanzo Migliorini were my bosses." And they
13 submitted that Mr. Costanzo -- in fact, there's a discrepancy
14 between their own facts where they agreed with defendants'
15 statement of material fact in paragraphs, I believe, 8 and 9
16 that Mr. Costanzo Migliorini was not a boss. So --

17 THE COURT: The problem I have with Peter, the part
18 that's difficult for me to get past, is that the only time
19 period that I can look at on the record that you have given me,
20 based on the arguments that you've made, would demonstrate that
21 Peter was the employer as of the time that his father died. I
22 don't know why you -- I can't put my hands around why you say
23 he morphed into being not the employer the day before and being
24 the employer the day after, simply because the father died. He
25 must have had that kind of role that set him up to

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1 automatically do that, unless you want to show me a piece of
2 paper that says when I die I designate Peter as my successor
3 and I leave the restaurant to Peter to run as he sees fit. On
4 what basis does he morph into the employer the day after the
5 father died, when he is nowhere close to the employer the day
6 before the father dies?

7 MR. KUBLANOVSKY: In part, your Honor, that was our
8 argument for why it took him so long after he decided to take
9 over the restaurant, for why he struggled so hard to understand
10 what his father did. Literally, he had to find the books and
11 records of the company, he had to figure out how to run and
12 operate the company. So from --

13 THE COURT: But why did he have to figure that out?
14 What designated him the person to have to do that? That's the
15 question. I understand what you're saying, that he may have
16 not have been prepared for his father's death, to take over the
17 restaurant, full responsibility for the restaurant, at that
18 point in time, but I don't know who anointed him the employer
19 the day the father died, how that came about.

20 MR. KUBLANOVSKY: I think, in all honesty, I think it
21 came about, your Honor, because Peter was in this family, in
22 this very traditional Italian family, he was looked upon as
23 someone who would carry out, hopefully, his father's legacy.

24 THE COURT: But that was true while his father was
25 still alive. When his father in the in the hospital, he was

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1 looked at that person, and I'm sure the relationship was a
2 little different or maybe a lot different when his father was
3 there on a day-to-day basis, but what you just said to me about
4 people looking to him to play that role, that also applies to
5 the employees. The employees looked to him -- there was the
6 nature of his responsibilities at the restaurant and the nature
7 of his relationships at the restaurant and his family
8 relationship; all parties looked to him as the person in charge
9 and the person to be the one who was going to obviously run the
10 business when his father was incapacitated, and take over the
11 business when his father wasn't around.

12 MR. KUBLANOVSKY: I'm not saying -- that's not an
13 unfair characterization, but based on the record and what
14 happened and how, after Peter assumed control, as is evident by
15 what happened less than a year later, there was certainly
16 something that materialized or that soured the relationship
17 between employees, some of whom had been there before Peter and
18 been working at the restaurant for much longer in terms of day
19 to day, when Peter was younger, when he started at the
20 restaurant.

21 So I believe there was a souring of the relationship
22 between the employees and Peter that ultimately came to a head
23 on February 7th, when five out of the six employees left. I
24 believe that there was something that happened that made that
25 relationship unequal. And that's what's key. After his father

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1 passed away --

2 THE COURT: But that relationship was never equal?

3 He's the son of the owner.

4 MR. KUBLANOVSKY: I'm not going to say he wasn't
5 owner --

6 MR. ELLIS: Mr. Kublanovsky, your Honor, is studiously
7 avoiding --

8 THE COURT: Wait, don't interrupt him. I'm going to
9 give you a full opportunity to address these issues.

10 MR. KUBLANOVSKY: What I want to differentiate, your
11 Honor, is the fact that this was a family-run restaurant.

12 THE COURT: Right, I understand.

13 MR. KUBLANOVSKY: Certainly, Peter was family, that
14 was part of the family that was running it, the running it part
15 being solely attributable to his father's return to the
16 position that we're trying to take here. However, the
17 employees, because in this fairly unusual situation, with a
18 restaurant we have so many employees that have been there for
19 so long and, as we have already inferred, because they were
20 treated well, when Peter's father passed away and Peter tried
21 to assume the mantle and run the restaurant, certainly there
22 was some resentment, we believe, there on the part of the
23 employees and which led to eventually some of them leaving.

24 I believe prior to that, everyone looked to Peter's
25 father because they knew he ran the show. Peter helped with

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1 certain responsibilities, as did the other employees. The one
2 interesting example that your Honor used was what if the
3 customer came to the waiter and had a dispute. That
4 relationship was between the customer and the waiter.

5 What we're talking about, for purposes of New York
6 Labor Law and the FLSA, is what are the hallmarks of being an
7 employer.

8 THE COURT: Right. So if I'm a customer in the
9 restaurant and I get into a dispute with the waiter and I say
10 to the waiter, I want to talk to the manager, Peter would be
11 the one to show up?

12 MR. KUBLANOVSKY: I believe here's what would probably
13 likely have happened, is that the waiter would go to Peter and
14 say he wants to talk to the manager. Peter would go to the
15 customer and say, you know --

16 THE COURT: I can't talk to you because my father's in
17 the hospital?

18 MR. KUBLANOVSKY: -- the manager, my father, isn't
19 here but tell me and maybe I can take it to my father. That's,
20 practically speaking, likely what happened.

21 THE COURT: Well, unless you had some evidence that
22 that's what happened, practically speaking, that's not likely
23 what happened. Practically speaking, what happened is that he
24 walked over and if this is a customer that he wants to satisfy,
25 he tried to solve the problem right then and there, and he took

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1 that responsibility and they looked to him to take on that
2 role. And he wouldn't say, well, you know, I know you don't
3 like the service here and you think we ought to take 10 percent
4 off the bill or we should give you a free glass of wine, I'll
5 tell you what, why don't you come back tomorrow because I'm
6 going to see my father tomorrow and I will ask him.

7 I am not going to assume that that's the way this
8 restaurant was run, you can speculate as to that, but that
9 would be an unreasonable speculation, that the restaurant was
10 run that way. If the waiter had a dispute with the customer,
11 the waiter would go to Peter, Peter would have to solve that
12 problem, that immediate problem, because he was the one who the
13 father put in charge to do the day-to-day operation of the
14 restaurant when he wasn't there. At this point, there is no
15 evidence that -- that was clearly the case after the father
16 died because he himself took on that mantle. It seems to be
17 fairly obvious that's the role he had while the father was in
18 the hospital. I don't know how he ended up with that role. He
19 obviously was the person that everyone assumed or knew was
20 taking on that role. And there's no reason to assume that he
21 had a different relationship even when the father wasn't sick
22 in the hospital when the father wasn't there and Peter was
23 there.

24 You can correct me if I am wrong -- I don't know if
25 the record reflects any of this -- but I assume that even when

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1 the father was fully engaged at the restaurant, on the rare
2 occasions that the father was not there, people looked to Peter
3 to fill in for the father.

4 MR. KUBLANOVSKY: I believe people looked to Peter to
5 communicate to his father -- and this is important, given the
6 other positions that the employees occupied. Again, they were
7 very long-serving employees there who worked independently and
8 knew what they had to do, so Peter didn't have to labor, as he
9 does now, entirely on his own in the kitchen. He had a kitchen
10 staff that had been there for many, many years, that knew what
11 to do. He didn't have to worry about that. He had to worry
12 about his responsibilities as an employee, playing part-time
13 host, doing food prep, doing all the little things that he had
14 always done, all the little things when he was growing up in
15 the restaurant, as children help their parents in restaurants.

16 THE COURT: But I'm not concerned about the little
17 things. I'm concerned about the decisions that had to be
18 made --

19 MR. KUBLANOVSKY: Yes.

20 THE COURT: -- that affect the employees and affect
21 the overall running of the restaurant. Those are not little
22 things. I walk into the restaurant, I find a fly in my soup, I
23 want to know who I'm supposed to talk to about that, who can do
24 something about that. By your relative relationship of the
25 family members, Peter seems to be the person who would be

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1 taking care of those issues when the father wasn't there.
2 That's after the father passed away, obviously, that's when the
3 father was in the hospital incapacitated, that's, I assume,
4 also when the father was on vacation, which may be rare, if
5 ever happened, or he had to go someplace else and Peter was at
6 the restaurant alone. Most of the time, I assume, by your
7 argument, that -- there's a hierarchy here; it goes from the
8 father to Peter, and then we can argue about the other family
9 members, but you seem to agree that Peter had a position that
10 was different vis-a-vis his father than his other siblings,
11 vis-a-vis the restaurant.

12 MR. KUBLANOVSKY: It was different, and the
13 differentiation I'm trying to make is that it was different
14 from a family sense.

15 THE COURT: No, it was different from a employee
16 sense, for the employees. If there's a problem when Costanzo,
17 Maria and Peter are in the restaurant and I'm the waiter and
18 I've got a complaint, by your argument, I'm going to go to
19 Peter? Your argument is that I wouldn't go to Costanzo and I
20 wouldn't go to Maria, I would go to Peter.

21 MR. KUBLANOVSKY: Well, Costanzo wasn't there and
22 Maria didn't do anything, so by process of elimination, maybe
23 they would go to Peter with a complaint that something
24 happened, tell your father, if his father isn't there, because
25 they knew who called the shots, and it was Peter's father, they

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1 didn't rely on Peter. So your Honor's right --

2 THE COURT: They knew who called the shots when Peter
3 wasn't there. By your argument, you said that they would not
4 complain to Maria and tell Maria, go call your father, they
5 would complain to Peter and Peter would -- they wouldn't say,
6 well, I've got a decision to make, they wouldn't go to Maria or
7 they wouldn't say get Costanzo on the phone. By your argument,
8 they would go to Peter, everybody knew to go to Peter, because
9 Peter was the voice and the stand-in for the employer when the
10 employer wasn't there.

11 Is it your argument that simply because the father
12 would have the ultimate say-so as to who would be fired, hired
13 and what their salaries would be, that because he had the final
14 say-so on that, that that eliminates anybody else from being
15 the employer?

16 MR. KUBLANOVSKY: In this situation, your Honor, I
17 think that is the argument, because Renato had all of the
18 hallmarks, exactly those that you mentioned, Peter could not
19 fire, he did not hire, he did not fire, he did not set payroll,
20 he did not set working conditions. He just did not do those
21 things that are, under the legal test, required for an
22 employer. And that's the distinction that we're trying to
23 make.

24 So whether it's a good distinction or not, whether it
25 succeeds or fails, that is the distinction that we're --

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1 THE COURT: What do you say Maria's role was?

2 MR. KUBLANOVSKY: Maria at all times was sitting in
3 the hostess chair, sometimes she would help with waitressing.
4 Those were her only roles that she ever occupied in the
5 restaurant, from the first day she started to today.

6 THE COURT: All right. Did she have an official job
7 title?

8 MR. KUBLANOVSKY: Maybe hostess, if that.

9 THE COURT: Did Peter have an official job title?

10 MR. KUBLANOVSKY: I don't think he did, actually. I
11 don't recall there ever being any title designated to him in
12 terms of what he did because, like I said, he --

13 THE COURT: In my view, that would make your argument
14 stronger, not weaker, because if you had a job title that said,
15 you know, he's the assistant chef, then I can say, well, he's
16 the assistant chef. You're saying, well, he didn't really --
17 he was sort of like, you know, the father's right-hand man.

18 MR. KUBLANOVSKY: I understand, your Honor, and I wish
19 I could say that, but because he did all these little things,
20 he didn't have any title because he was just picking up. He
21 cleaned up after --

22 THE COURT: On what authority? What was he being paid
23 for?

24 MR. KUBLANOVSKY: He was being paid for these little
25 things, to help with food prep, that was one of his

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1 responsibilities, to help clean up after the restaurant closed,
2 and to help with occasional hostessing duties if his sister was
3 sick or occasional waiting duties if for some reason the
4 restaurant was very busy. So he would play all these roles, to
5 help out in the kitchen, which is why he knew -- help out in
6 the restaurant, which is why he knew how the restaurant
7 functioned and why he had the greater range of experience, I
8 would say, in the restaurant.

9 And perhaps that's why everyone looked at him, because
10 he knew how all the other employee roles.

11 THE COURT: Ultimately, other than the father, who had
12 supervisory or managerial responsibility at the restaurant?
13 Other than the father.

14 MR. KUBLANOVSKY: No one. It was the father.

15 THE COURT: Well, that can't be, that can't be.

16 MR. KUBLANOVSKY: The father was there almost every
17 single day, almost never took vacation.

18 THE COURT: Okay, so when he wasn't there, and when he
19 did take vacation, there had to be a managerial or supervisory
20 employee on-site. Who was it? If you don't want to say --

21 MR. KUBLANOVSKY: They closed for two weeks out of the
22 year.

23 THE COURT: They didn't close when he was in the
24 hospital.

25 MR. KUBLANOVSKY: You're right. And that's why I was

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1 saying, your Honor, I cannot deny that his son took instruction
2 from his father during that point because factually that's what
3 happened.

4 THE COURT: That's why I keep separating Peter from
5 the others, because I know there's a different argument to be
6 made. But you don't want to concede on this record that other
7 than the father, the only other person that you are arguing
8 that had any supervisory or managerial responsibilities was
9 Peter, but are you genuinely arguing that Peter had no
10 supervisory or managerial responsibilities? That can't be the
11 case because even if he had to go to the father, the fact that
12 he's the one that goes to the father would give him some
13 supervisory or managerial responsibility, as opposed to Maria
14 or Costanzo.

15 MR. KUBLANOVSKY: I understand the difficulty here,
16 and unfortunately --

17 THE COURT: A difficulty?

18 MR. KUBLANOVSKY: Well, we're trying to differentiate
19 Peter's role.

20 THE COURT: Right.

21 MR. KUBLANOVSKY: And what we are attempting to argue,
22 your Honor, and because it is in fact what happened, is that
23 his role, to the extent there was any in, let's say, managing
24 the restaurant, was to take orders from his father.

25 THE COURT: No, I understand that, but that doesn't

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1 preclude him from being an employer, simply because he
2 ultimately reports to the father. If I'm suing Microsoft, you
3 can't just argue to me the only employer is Bill Gates or the
4 only person who has any supervisory responsibility, because if
5 an important decision has to be made, Bill Gates better go
6 along with it or it's not going to get done.

7 MR. KUBLANOVSKY: I wouldn't make that argument, your
8 Honor, and I'm not really making that argument here. It is a
9 fine point that I'm making, I will definitely concede, but it's
10 based on the record and on the affidavits that have been
11 submitted and what role Peter occupied at the restaurant.

12 THE COURT: Well, other than Peter, what role are you
13 saying that others said that Peter occupied that takes him out
14 of the realm of employer?

15 MR. KUBLANOVSKY: Well, Mr. Ortiz in his affidavit
16 says much the same, even Peter's sister.

17 MR. ELLIS: There is no plaintiff Ortiz. I think you
18 mean Pineda.

19 THE COURT: Ortega Diaz.

20 MR. KUBLANOVSKY: Mr. Fernando Ortiz, who was the
21 waiter for over 20 years at the restaurant, he --

22 THE COURT: He says what?

23 MR. KUBLANOVSKY: In his affidavit, in paragraphs 4
24 and 5 of his affidavit, he says Renato --

25 THE COURT: Slow down.

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1 MR. KUBLANOVSKY: I'm sorry.

2 "Renato Migliorini controlled employee work schedules,
3 set compensation levels for employees, paid employees and
4 generally managed the overall business of the restaurant."

5 THE COURT: We all concede that.

6 MR. KUBLANOVSKY: And in paragraph 5, he says, "Prior
7 to Renato Migliorini's death in April 2014, neither his son,
8 Peter Migliorini, or his daughter, Maria Migliorini, ever held
9 any management responsibilities at the restaurant. Neither I
10 nor any of the plaintiffs ever reported to or took direction
11 from either Peter Migliorini or Maria Migliorini Cintron."

12 THE COURT: But I don't know what that means. Then,
13 when the father wasn't there, you still say they go to Peter?
14 For any decision that the employees cannot make themselves,
15 they go to Peter?

16 MR. KUBLANOVSKY: They go to Peter with a request
17 because he would go to his father, and they knew that.

18 THE COURT: Under what authority do they go to Peter?
19 Why do they go to Peter, as opposed to his sister, his brother,
20 or the head chef?

21 MR. KUBLANOVSKY: Because --

22 THE COURT: Because Peter has been designated the
23 stand-in, the managerial employee's voice by Renato.

24 MR. KUBLANOVSKY: I would go to the first part. He
25 was definitely designated the stand-in.

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1 THE COURT: For who?

2 MR. KUBLANOVSKY: For his father, the stand-in to
3 go -- he was the consigliere, if you will. He would go to his
4 father and everyone knew that's what he would do because that's
5 what he was doing.

6 THE COURT: I know, but I cannot determine the motion
7 based on that argument. Maybe you can convince a jury that
8 somehow Peter didn't have anything, didn't have a clue what was
9 going on, he was just an employee up until his father died,
10 when he tried to take over, and so they should limit his
11 exposure, individual exposure, to the period of time that he
12 was an employer, but I don't know how he got to be the
13 employer.

14 What you said to me on this record is that the father
15 ran the restaurant, then the father got ill, then the father
16 went to the hospital, then the father died, and after the
17 father died, Peter miraculously is the employer. I mean that's
18 it. He just walks in the next day and says, okay, I'm the
19 boss. It doesn't happen that way, it can't happen that way.
20 Somebody has to give him that authority, and that authority has
21 to be either perceived or actual.

22 Now, I don't see here where on his deathbed the father
23 says, okay, of my three children, Peter, I'm designating you,
24 you now own the restaurant or you're now the employer, you have
25 to take care of things; everybody else, if you want to work for

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1 Peter, that's fine but Peter is now the boss. I don't see that
2 on the deathbed. I just see that the father died, Peter walks
3 in the next day and everybody pretty much acts the way they
4 assumed that everybody was going to act, that once the father
5 died, Peter was going to continue to play the role of stand-in
6 for the father, just now he's standing in for the father
7 permanently because the father is not going to make the
8 decisions, Peter is going to make the decisions. And he
9 doesn't say, well, I have to go, we have to huddle with the
10 sister and the brother and we have to vote, you know, have a
11 unanimous vote. It's a coup, Peter has taken over somehow. I
12 don't know how he's now the employer and the day before, when
13 was he still the person everybody turned to when they couldn't
14 get a hold of Renato, that now Peter has, as I say, morphed
15 into the employer.

16 That's a harder argument to make and it's clearly not
17 an argument that can be made, that asks me to dismiss Peter
18 from this case because there's no evidence that Peter was an
19 employee, that he is being sued in his appropriate capacity as
20 employer. He's obviously being sued in his appropriate
21 capacity as an employer because you concede he's an employer,
22 at least after the father died. He's just trying to limit the
23 extent of his personal liability.

24 MR. KUBLANOVSKY: I think that's right, your Honor.
25 As I said, to speak candidly, it's a much harder argument that

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1 he was not the employer after his father died. And certainly
2 there was that transitional period while his father was in the
3 hospital, that for all intents and purposes, whoever was there
4 at the restaurant, it was Peter that was giving the orders from
5 his father.

6 So, to the extent that he was in any position of
7 authority, it would be by virtue of his being at the restaurant
8 when his father was not there, communicating with his --

9 THE COURT: No, but that's not true.

10 MR. ELLIS: Your Honor, could I --

11 THE COURT: It's by virtue of something else because
12 you're telling me Maria is the hostess. She's sitting right
13 there, she's in the restaurant every day, she's related to him.
14 What's the distinction you draw between Peter and Maria?

15 MR. KUBLANOVSKY: I think, as I said before, it was
16 the breadth of Peter's experience at the restaurant, I think,
17 as an employee, that gave his father comfort to know that Peter
18 knew, from an employee's perspective, while he was handling all
19 these different responsibilities, at least up front, the front
20 part of the operations would be run, meaning the service to the
21 customers, the food prep, all these little things.

22 THE COURT: So what managerial or supervisory
23 responsibility did the father give Peter that he didn't give
24 Maria?

25 MR. KUBLANOVSKY: That he gave Peter?

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1 THE COURT: Right.

2 MR. KUBLANOVSKY: He didn't give either of them those
3 responsibilities, and I think that's what we're trying to
4 communicate. This was not a type of restaurant --

5 THE COURT: Well, he give him that responsibility
6 while he was sick.

7 MR. KUBLANOVSKY: Yes, your Honor.

8 THE COURT: So what responsibilities did he give to
9 Peter when he was in the hospital and wasn't running the
10 restaurant day to day, that he didn't give to Maria? What's
11 the evidence of that?

12 MR. KUBLANOVSKY: He gave him the responsibilities to
13 communicate his orders, to run in his -- to communicate the
14 orders how the restaurant should be run, to the other
15 employees.

16 THE COURT: So he had a higher responsibility than
17 Maria? He gave him a higher responsibility --

18 MR. KUBLANOVSKY: I would have to concede that, your
19 Honor, because factually that is what happened. He was the one
20 that went to see his father, he got the orders for the day, he
21 would go back and he would tell people what to do. So those
22 are the facts --

23 THE COURT: Isn't going back and telling people what
24 to do really the crux of it?

25 MR. KUBLANOVSKY: Yes, your Honor, I agree.

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1 THE COURT: It depends on what he went back and told
2 them to do.

3 MR. KUBLANOVSKY: I agree.

4 THE COURT: You want to say that every question that
5 the employees asked Peter, Peter's answer always started out
6 with, Renato says no, or Renato says yes, not that, yeah, you
7 should do this, no, you shouldn't do this? I'm not sure that's
8 what you're trying to argue.

9 MR. KUBLANOVSKY: No, I'm not, and I don't think that
10 would be a believable or credible argument that would have
11 happened, because I'm sure during Peter's experience in the
12 restaurant -- he's worked there for 20-some-odd years just like
13 some of the other employees -- I'm sure he had a feeling for
14 how things may have operated, so I don't think it would be a
15 credible argument to say that for every single issue that came
16 up.

17 However, it is the case that for every issue, under
18 the test that the Second Circuit uses to determine whether a
19 person, an individual, is an employer, that for those key
20 decisions, which I'm not sure he was asked but let's assume
21 that some employee came up to him and said, you know, I'm not
22 getting paid enough, I want to be paid more, he did not have
23 authority to, while his father was alive, to make those
24 decisions.

25 THE COURT: How did he get that authority when his

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1 father died?

2 MR. KUBLANOVSKY: It's a good question, your Honor.

3 THE COURT: I want a good answer.

4 MR. KUBLANOVSKY: It's a good question. He assumed
5 the role. That's the best unsatisfactory answer I can probably
6 give to your Honor, is that he did assume the role with the
7 blessing of his --

8 THE COURT: I know Mr. Ellis is anxious to be heard
9 but let me just ask you the last question. First of all, how
10 many waiters were there, employees?

11 MR. KUBLANOVSKY: There was one full-time waiter,
12 Mr. Ortiz, who's still there. Peter helped out with the
13 waitstaff duties, as did Peter's sister, Maria, from time to
14 time.

15 THE COURT: The plaintiffs are who? The plaintiffs
16 are not waiters, they are kitchen staff?

17 MR. KUBLANOVSKY: We have Mr. Pineda, who was the
18 busboy; Mr. Jaquez, who was the cook; Mr. Diaz was the
19 dishwasher; Mr. Arizmendi also did food prep; and
20 Mr. Guayllasac was the kitchen manager.

21 THE COURT: How often would Peter talk to the father?

22 MR. KUBLANOVSKY: Daily, when he was there.

23 THE COURT: Meaning?

24 MR. KUBLANOVSKY: Every day, because his father was
25 there every day.

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1 THE COURT: I mean when he was in the hospital.

2 MR. KUBLANOVSKY: I believe he would see him almost
3 daily.

4 THE COURT: Meaning what? When would the restaurant
5 open? When would he speak to the father?

6 MR. KUBLANOVSKY: I think he would go in the mornings.
7 The restaurant didn't open until the afternoon, so he would go
8 in the mornings. And I believe -- I can't guarantee that he
9 did it daily but I'm almost positive that he did because he
10 would have to go and speak with his father. He also wanted to
11 check on his father and meet with his father, but in the course
12 of that meeting he would ask his father about the restaurant.
13 The restaurant was his father's life, and that was his father's
14 number one concern.

15 THE COURT: So you're just relying on the one
16 communication that dealt with all of these issues in the
17 morning before the restaurant opened, when he went to see the
18 father?

19 MR. KUBLANOVSKY: Right. But that relationship wasn't
20 really that much different when his father was at the
21 restaurant because Peter would come in and his father would
22 say, this is what you have to do, this is what everyone's
23 doing. So I don't want to say this is unique because it
24 wasn't.

25 THE COURT: Okay, I accept that.

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1 My final question was: All right, he goes to the
2 hospital to see his father in the morning, they talk about
3 what's going to happen and any major decisions that have to be
4 made, then Peter goes to the restaurant, Peter gets to the
5 restaurant, one of these plaintiffs calls in sick. I assume
6 Peter has the authority to make sure that that issue is dealt
7 with on the spot, as the employer --

8 MR. KUBLANOVSKY: I think --

9 THE COURT: -- as the managerial person, the
10 supervisory person, if the cook doesn't show up, I assume that
11 Peter has the authority -- or the busboy doesn't show up or
12 whatever these other employees, their roles were, if they
13 didn't show up and they were needed, that person was needed to
14 have the restaurant open that day -- that Peter would be the
15 person who was given the authority to make those kinds of
16 decisions to find somebody to replace them.

17 MR. KUBLANOVSKY: To the extent that Peter had to do
18 that, I wouldn't argue that point. I believe he either took
19 those responsibilities because he was in the one that was best
20 positioned because of his experience.

21 THE COURT: Right. But he didn't have to go back to
22 the father and say, well, you know what, the busboy didn't show
23 up, is it okay if I call in Charles, who we bring in sometimes
24 to fill in for him, because we need a busboy? He would make
25 that decision.

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1 MR. KUBLANOVSKY: I would agree with your Honor, he
2 would likely make that decision, if not for anything more than
3 not bothering his father who was ill. But to the extent that
4 he would be able to undertake those responsibilities, yes.

5 But --

6 THE COURT: Even when his father wasn't ill?

7 MR. KUBLANOVSKY: No, that's not --

8 THE COURT: As you say, if the father was away, he
9 would have to get the father's permission to find somebody to
10 fill in.

11 MR. KUBLANOVSKY: He would do much the same, he would
12 be the one filling in.

13 THE COURT: I don't know what you mean, he would be
14 the one filling in.

15 MR. KUBLANOVSKY: Because of his knowledge --

16 THE COURT: He would make the decision as to how --

17 MR. KUBLANOVSKY: He would make the decision, he would
18 do it himself. So, yes, your Honor, if there was a decision to
19 be made, he would make that decision.

20 THE COURT: He had the authority to go ahead and find
21 somebody to replace that employee for that day?

22 MR. KUBLANOVSKY: Even if that was himself, which it
23 was. But practically -- well, the reality of the situation
24 was, the father was there all the time. I really believe --

25 THE COURT: That would be a hard evidentiary issue,

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1 for me to conclude that the father was there all the time.

2 MR. KUBLANOVSKY: And that I understand.

3 THE COURT: We know the father wasn't there all the
4 time, because he was sick in the hospital, lying up in the bed
5 for months. We know he wasn't there all the time.

6 MR. KUBLANOVSKY: Correct. Other than that period --
7 and that's why on the record here, I will admit that.

8 THE COURT: So let me hear from Mr. Ellis. What is
9 it --

10 MR. ELLIS: Thank you, your Honor. I was going to
11 say, first of all, the point that -- and I commend him for
12 going that entire time without mentioning this fact, it's
13 basic, but from 2006, Maria and Peter were both shareholders in
14 the corporation and officers of the corporation.

15 THE COURT: But that doesn't make them an employer.

16 MR. ELLIS: That's correct, in and of itself. But it
17 does explain, to your Godfather analogy, why Peter was in line
18 to take over the family business.

19 THE COURT: Well, wasn't Costanzo also --

20 MR. ELLIS: When the company was started, there are
21 two brothers, Costanzo and Renato, each 50 percent owners. At
22 the end of 2005, Costanzo wants out of the business, I don't
23 know why, but he leaves the business, his 50 percent goes in
24 equal parts, 25 percent each, to Peter and Maria. Peter and
25 Maria have worked at the restaurant the entire time since 1993,

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1 when it opened.

2 THE COURT: Okay. So other than being the hostess,
3 what was Maria's job?

4 MR. ELLIS: Well, Maria supervised the front of the
5 house. And this --

6 THE COURT: What does that mean?

7 MR. ELLIS: -- is explained in Mr. Pineda's
8 declaration.

9 If we go to paragraphs 8 and 9 of Mr. Pineda's
10 declaration, he's speaking from 2000, when he started working
11 there, "Throughout that time, Peter and Maria Migliorini also
12 worked at the restaurant supervising waiters and hostesses and
13 generally helping to run the restaurant. Peter or Maria would
14 pay me. When Peter was working, he would pay the employees but
15 when Maria was working, she would pay the employees, and when
16 Renato was working, he would pay the cook employees."

17 THE COURT: Okay.

18 MR. ELLIS: "It always alternated depending on who was
19 working."

20 THE COURT: So let me concentrate on what you just
21 said about Maria. First of all, part of that is group
22 pleading. It says "Maria and/or Peter."

23 MR. ELLIS: Yes. If you would allow me, the next
24 paragraph addresses Maria more directly. "Because I was a
25 busboy" -- this is again quoting from Mr. Pineda's declaration

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1 at paragraph 9 -- "because I was a busboy, Maria directly
2 supervised me throughout my employment and generally made my
3 life miserable. Maria would badmouth and degrade me. And I
4 believe that she regularly stole money from employees' tips. I
5 was also -- I was never able to see how much I made in tips
6 total."

7 THE COURT: Okay. But what part of that activity is
8 employer activity?

9 MR. ELLIS: "Maria supervised the tip pool. Maria
10 would simply give me some amount of the tips but I never knew
11 how much the total was, so I was never able to see if I was
12 being paid fairly. When I believed my tips were incorrect and
13 I was owed more money, she would make rude comments about my
14 legal status in this country or would say that I should be
15 content with the amount that I had been given, that it was good
16 money."

17 THE COURT: So, wait a minute. She is the one that --
18 what do you say her role was?

19 MR. ELLIS: Maria supervised the front of the house.

20 THE COURT: What does that mean? That's a legal
21 conclusion. What did she do?

22 MR. ELLIS: She was in charge of supervising the
23 employees.

24 THE COURT: What does that mean? That doesn't mean
25 anything. Was Peter in charge of supervising?

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1 MR. ELLIS: Yes, they both were.

2 THE COURT: Well, what did she do to supervise them?

3 MR. ELLIS: Well, what's laid out here is that she
4 determined the amount of tips that were paid --

5 THE COURT: That doesn't say she determined the amount
6 of tips. It says she gave them the tips and said that these
7 are the tips that you're supposed to have. Where does it say
8 that she was the one who determined the tips?

9 MR. ELLIS: It's unclear, but she was the one -- first
10 of all, they all, both Maria and Peter, paid the employees.

11 THE COURT: That means they physically gave them cash
12 or check?

13 MR. ELLIS: It depended on the employee, I believe.

14 THE COURT: Okay. What else did she do, other than to
15 hand them their wages? We don't do this anymore -- we don't
16 have checks -- but if my law clerk hands my secretary her check
17 every week, that doesn't make my law clerk her employer.

18 MR. ELLIS: Correct.

19 THE COURT: What is it about Maria handing him his
20 wages -- of course there's some issue with other stuff that
21 maybe this might be an employer, but other than giving him the
22 check and giving him his portion sometimes of the tips -- what
23 page were you reading from?

24 MR. ELLIS: From page 2, paragraphs 8 and 9 of
25 Mr. Pineda's declaration, Luis Pineda, document 52 in the

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1 docket, your Honor.

2 THE COURT: I know you quoted it in the brief.

3 MR. ELLIS: I did. It's quoted in my brief at page, I
4 believe, 9.

5 THE COURT: Paragraphs 6 through 9?

6 MR. ELLIS: Yes. Paragraphs 8 and 9 particularly.

7 THE COURT: Paragraph 8 and 9 on page 8. All right,
8 okay. And I'll get to Peter, but these are the factual
9 allegations that you say warrant holding Maria as an employer,
10 right?

11 MR. ELLIS: That's right, your Honor.

12 THE COURT: Is there any other, before I look at these
13 more carefully -- I haven't highlighted them so I am going to
14 go through them with you -- is there something else I should be
15 looking at?

16 MR. ELLIS: No, that's it. I'd also put this again in
17 conjunction with the fact that she was a corporate owner and an
18 officer of the company, because the law is clear on this -- and
19 there is the distinction that's properly made between
20 possession of this authority and exercise of it -- possession
21 alone is sufficient to make somebody an employer under the FLSA
22 and the New York Labor Law.

23 THE COURT: So what authority do you say she
24 possessed?

25 MR. ELLIS: We believe, and I believe, that these

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1 facts establish -- and again we're at the summary judgment
2 stage, obviously -- these facts establish she had all the
3 requisite control indicia of control to make her an employer
4 under the FLSA and the New York Labor Law. She supervised
5 employees --

6 THE COURT: How?

7 MR. ELLIS: She determined -- well, Mr. Pineda, I
8 believe, worked in the front of the house because he was a
9 busboy.

10 THE COURT: Do you agree that she was the hostess?
11 That was her primary responsibility? Or you don't agree?

12 MR. ELLIS: It's our position that she was the manager
13 of the front of the house.

14 THE COURT: Well, again, those are legal conclusory
15 terms. I don't know what that means.

16 MR. ELLIS: So is "hostess," with all due respect.

17 THE COURT: Well, no, not unless you tell me that,
18 yes, she was the hostess and the job of the hostess is to greet
19 the customers at the front door when they come in and seat
20 them. That's why I'm asking you: What is her job function
21 that you say pushes her over the limit to become the employer?

22 First of all, you're not claiming that she hires
23 anyone?

24 MR. ELLIS: None of the plaintiffs, no.

25 THE COURT: And you're not contending that this is

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1 evidence that she had the authority to fire anyone?

2 MR. ELLIS: No. They all quit.

3 THE COURT: Okay. But they could have still quit
4 and --

5 MR. ELLIS: Yes, and somebody else, they could have --
6 right, no.

7 THE COURT: So she didn't have the authority to hire
8 him?

9 MR. ELLIS: Well, no, that's not true. Again, this
10 gets possession or exercise. Our argument is that she in fact
11 possessed all of those authorities.

12 THE COURT: Well, what's the evidence that she had
13 authority to hire someone?

14 MR. ELLIS: She owned 25 percent of the corporation
15 and she was a corporate officer and she was there on a
16 regular basis --

17 THE COURT: That doesn't give her the authority --

18 MR. ELLIS: -- supervising the function of the
19 corporation.

20 THE COURT: But that's not true. Those conclusions
21 don't lead there. Because she has a significant ownership
22 interest and also works there -- and I assume she had a salary,
23 right?

24 MR. ELLIS: I would assume so, yes.

25 THE COURT: I don't know if you guys are disputing

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1 that.

2 MR. ELLIS: I don't dispute that.

3 THE COURT: That's what I'm trying to figure out.

4 That's why I asked earlier what Peter's job description was.

5 Did she have a job description as hostess or some other job --

6 MR. ELLIS: I think that may be in dispute. I think
7 they would try and minimize her role by calling her a hostess,
8 saying that's all she ever did, was seat people.

9 THE COURT: Did she ever have a job title, that your
10 clients were aware of?

11 MR. ELLIS: No, not to my knowledge, no.

12 THE COURT: What was her day-to-day function? Was it
13 to play a traditional hostess role --

14 MR. ELLIS: No, more so. According to Mr. Pineda, it
15 was to directly supervise him on a daily basis.

16 THE COURT: Mr. Pineda, what was his job?

17 MR. ELLIS: A busboy.

18 THE COURT: What did she do? Give me an example of
19 what she did to supervise Mr. Pineda?

20 MR. ELLIS: She would determine, based on this
21 testimony, she would determine his tips.

22 THE COURT: Where does it say she determined the tips?

23 MR. ELLIS: Paragraph 9. "Maria would simply give me
24 some amount of the tips."

25 THE COURT: I'm looking at 9, and I have a different

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1 one. I'm on page 8. Oh, I see, you're on page 9.

2 MR. ELLIS: Page 9.

3 I would also point out, your Honor -- and this is a
4 quote from Slamma versus API Restaurant Corp., 2012, U.S. Dist.
5 LEXIS 102043, Southern District July 20, 2012 -- "The
6 overwhelming weight of authority is that a corporate officer,"
7 which she was, "with operational control of a corporation's
8 covered enterprise," which she had" --

9 THE COURT: Well, what's the operational control?
10 That's what I'm trying to get at.

11 MR. ELLIS: She supervised Mr. Pineda --

12 THE COURT: Give me an example of a supervisory
13 decision that you say the evidence indicates, which would
14 indicate taking supervisory action as to Mr. Pineda.

15 MR. ELLIS: She had the authority to pay employees.

16 THE COURT: What do you mean by "have the authority"?
17 She had the authority to do what? To hand them their
18 paychecks?

19 MR. ELLIS: Right, that wasn't given to anyone. You
20 don't just trust any random employee or any person off the
21 street to pay your employees. It's management that pays
22 employees.

23 THE COURT: No, it's management that issues the check.
24 You can trust any employee to hand out the checks.

25 MR. ELLIS: That's not how they functioned.

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1 THE COURT: Well, what makes you say that? I don't
2 see anything here. What makes me say that?

3 MR. ELLIS: Both the plaintiffs who submitted
4 affidavits testified that they were paid by either Peter or
5 Maria on multiple occasions.

6 THE COURT: Which means what, that she gave them --
7 were they paid in cash or check?

8 MR. ELLIS: I believe combinations of both, your
9 Honor.

10 THE COURT: All right. So she gave them their wages?

11 MR. ELLIS: Correct.

12 THE COURT: She handed it to them?

13 MR. ELLIS: Correct.

14 THE COURT: Other than handing them their wages, what
15 other responsibility did she have over their wages? Any? Is
16 there any evidence that she set those wages, that she had the
17 authority to withhold the paycheck? Is there anything else
18 other than handing the paycheck?

19 MR. ELLIS: For Maria, there is evidence -- and,
20 again, this is Mr. Pineda's declaration at paragraph 9 -- that
21 Maria supervised the tip pool.

22 THE COURT: Where does it say she supervised the tip
23 pool? It doesn't say that. It says he accused her of stealing
24 monies from the employees' tips. That's not a managerial role,
25 one way or the other.

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1 MR. ELLIS: She has to have access to even do that.
2 Even if you're talking about, say, an owner, in a very classic
3 owner-versus-manager scenario, which we don't have here, but if
4 somebody has the capability of even stealing from the tip pool,
5 it means that they're in a class separate and apart from the
6 other employees.

7 THE COURT: That's not necessarily true. I assume
8 everybody has some access to the tip pool because they each
9 individually get the tips. If I'm sitting in a restaurant
10 eating and I give the waiter a \$20 tip, he has access to the
11 tip pool because he has to take that \$20 and put it in the tip
12 pool.

13 MR. ELLIS: Right.

14 THE COURT: That doesn't make him an employer.

15 MR. ELLIS: No, but it does put him in a separate
16 category from, say, a busboy, who doesn't have such access.
17 And, again --

18 THE COURT: We're not arguing about whether the busboy
19 is an employer. Your argument is this --

20 MR. ELLIS: Or the waiter.

21 THE COURT: I'm trying to concentrate on the exact
22 facts that you're giving me.

23 MR. ELLIS: Right.

24 THE COURT: You gave me two facts that you say -- no,
25 I'll give you three facts and you can add to that, if you

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1 will -- that you say make her the employer, a combination of
2 these factors. You say, one, she's an owner/shareholder,
3 that's the first factor; two, that she would hand them their
4 pay --

5 MR. ELLIS: Right.

6 THE COURT: -- sometimes; and three, that she would
7 hand them their portion of the tips and --

8 MR. ELLIS: No, I would disagree with that
9 characterization. And I would add another. I would say
10 that -- again, this is Mr. Pineda's declaration at paragraph
11 9 -- "Maria directly supervised me throughout my employment."

12 THE COURT: I know, but that's not a fact. I need a
13 fact. In what way did she supervise him? Did she tell him
14 which tissues to pick up? Is there some deposition testimony
15 that tells me that she had a relationship with these plaintiffs
16 and that, by the nature of that relationship, I can conclude
17 that that means she is their supervisor?

18 MR. ELLIS: No. I inherited this case from a previous
19 associate, so I won't.

20 THE COURT: Not a good excuse.

21 MR. ELLIS: Yes. So I don't believe that there were
22 depositions taken of Mr. Pineda.

23 THE COURT: Well, you take the case as you find it.

24 MR. ELLIS: I stand to be corrected if I'm wrong on
25 that.

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1 THE COURT: I'm looking at paragraph 9. It says, "She
2 supervised me." And then when I read the rest of the
3 paragraph, it says that the only things that -- I'm sorry, show
4 me where it says that she gave them the paychecks.

5 MR. ELLIS: Paragraph 8.

6 THE COURT: Oh, 8.

7 MR. ELLIS: "When Maria was working, she would pay the
8 employees."

9 THE COURT: It says, "Peter or Maria would pay."
10 That's what you're relying on?

11 MR. ELLIS: Right.

12 THE COURT: Okay.

13 MR. ELLIS: "When Maria was working."

14 THE COURT: She would pay the employees? Okay.

15 So at this point, I guess what we're saying is -- tell
16 me if I'm interpreting this paragraph correctly -- if Peter was
17 the only one there, he paid employees; if Maria was the only
18 one there, she paid employees; if Renato was the only one
19 there, he paid employees? That's basically what I read this to
20 say.

21 MR. ELLIS: Right.

22 THE COURT: So if Renato was there, who pays the
23 employees?

24 MR. ELLIS: Unclear.

25 THE COURT: Okay.

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1 MR. ELLIS: It also says cook employees, for Renato,
2 as opposed to all employees.

3 THE COURT: Oh, I see, okay.

4 So if Peter and Maria are there, who pays the
5 employee?

6 MR. ELLIS: Unclear.

7 THE COURT: Okay.

8 MR. ELLIS: I would think it would be Peter.

9 THE COURT: If Maria and Renato are there, who pays
10 the employee?

11 MR. ELLIS: Based on this, it seems that Renato paid
12 the cooks and that Maria would pay the others.

13 THE COURT: Well, what's the distinction?

14 MR. ELLIS: I don't think there really is one.

15 THE COURT: You agree that Renato is the owner and the
16 proprietor and he ultimately hired all of these people, right?

17 MR. ELLIS: Hired them, yes; owner and proprietor, no.
18 At that time, undisputedly, Maria and Peter were also owners
19 and proprietors who worked there on a daily basis. So all
20 three of them owned shares in the corporation and worked there
21 on a daily basis and were officers of the corporation and paid
22 employees and supervised them and determined the tip pool, did
23 all the things that employers do, all three of them.

24 THE COURT: Well, again, you've only given me, other
25 than wanting to rely on your legal conclusory statement that

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1 she supervised employees, I don't have any affidavit,
2 depositions or anything that tells me what she did that would
3 make me conclude that she was a particular plaintiff's
4 supervisor or manager.

5 MR. ELLIS: That's not so, your Honor. Mr. Pineda,
6 his declaration specifically addresses this.

7 THE COURT: Okay.

8 MR. ELLIS: It's not our position that Maria
9 supervised all of the employees.

10 THE COURT: So who did Maria supervise?

11 MR. ELLIS: The front-of-the-house employees.

12 THE COURT: Which of the plaintiffs did Maria
13 supervise?

14 MR. ELLIS: Mr. Pineda.

15 THE COURT: Just Mr. Pineda?

16 MR. ELLIS: At least Mr. Pineda.

17 THE COURT: Well, just Mr. Pineda? Is there any
18 evidence in this record that she supervised any other type of
19 employee other than Pineda?

20 MR. ELLIS: I believe that Mr. Guayllasac also
21 testified that she was a boss at the restaurant and supervised
22 employees.

23 THE COURT: What was Pineda's job?

24 MR. ELLIS: He states, in fact, at paragraph 7 -- this
25 is on page 8, this is from Mr. Guayllasac's declaration -- he

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1 testifies that, yes, that Peter and Maria worked at the
2 restaurant, supervised waiters and hostesses, and generally
3 helped run the restaurant, that on occasion Peter or Maria
4 would pay me.

5 THE COURT: Okay. But that doesn't tell me which one
6 of them supervised the waiters and which one of them supervised
7 the hostesses.

8 MR. ELLIS: That's true. He goes on at paragraph 9
9 and says that Peter and -- this is following Renato's death --
10 that they were both, Peter and Maria, equally in charge of
11 monitoring and disciplining employees.

12 THE COURT: All right. So give me a fact that would
13 establish that. Tell me what she did that would make this a
14 correct statement, make this a factual statement.

15 MR. ELLIS: I would again --

16 THE COURT: What is he basing that conclusion on?

17 MR. ELLIS: This is his testimony.

18 THE COURT: Well --

19 MR. ELLIS: As to specific --

20 THE COURT: Was he ever deposed? I assume no.

21 MR. ELLIS: I assume no.

22 THE COURT: Because I assume if you had deposed this
23 guy, then you would have said -- well, you said in your
24 affidavit that Peter and Maria were both equally in charge of
25 monitoring and disciplining employees. Give me an example of

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1 when and how Maria monitored an employee, and give me an
2 example of how Maria disciplined and when Maria disciplined an
3 employee and then he would have said, well, yeah, I remember
4 when Jose was working and Jose wasn't moving fast enough, Maria
5 went in there and said, Jose, get your stuff together or you're
6 fired, I want you out there and I want you out there now, that
7 I specifically remember when she disciplined and she said I'm
8 docking your pay five dollars because you're just not working
9 hard enough today. She would have given a factual scenario.

10 MR. ELLIS: Right.

11 THE COURT: I'm looking for some facts. This is
12 summary judgment. I'm looking for some facts that support
13 whether or not at this stage of the proceeding, what evidence
14 that you're going to present to a trier of fact on which the
15 jury can conclude, yes, she did monitor and -- what was the
16 word?

17 MR. ELLIS: Supervise.

18 THE COURT: -- and discipline, supervise, monitor and
19 discipline. I don't see any example of supervision, I don't
20 see any example of monitoring, I don't see any example of
21 discipline on behalf of Maria.

22 MR. ELLIS: I disagree. First of all, we have the
23 pay.

24 THE COURT: Well, what do you consider that to be --
25 monitoring, supervision or discipline -- giving them the

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1 paycheck?

2 MR. ELLIS: If I had to pick any of those verbs, I
3 would pick monitoring.

4 THE COURT: How is handing them the paycheck
5 monitoring the employee?

6 MR. ELLIS: You're making sure that they're paid.
7 This is one of the basic terms of an employer --

8 THE COURT: It doesn't say she made sure they were
9 paid. It says she handed them the paycheck, gave them the
10 paycheck.

11 MR. ELLIS: Right. That is making sure that your
12 employees --

13 THE COURT: If I gave it to the busboy and I said give
14 this to the waiter, that doesn't make the busboy a supervisory
15 employer and that doesn't give him some authority over the
16 paycheck. He's the delivery person.

17 MR. ELLIS: Right.

18 THE COURT: She's the delivery person. Somebody gave
19 her -- you don't claim she wrote those checks?

20 MR. ELLIS: No.

21 THE COURT: You don't claim she issued those checks?

22 MR. ELLIS: No.

23 THE COURT: You don't claim that she set those wages?

24 MR. ELLIS: It also appears from the record -- and
25 this is not quoted in here but this is Mr. Pineda's

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1 declaration, paragraph 12: "It was Peter's idea to start
2 paying the cook employees in checks around September 2014 but
3 they were empty checks since employees were paid in cash. The
4 check was only for the record. I was also paid in cash and was
5 never given an empty paper check."

6 THE COURT: So that says that it was Peter's decision,
7 it wasn't Maria's decision.

8 MR. ELLIS: It also implies that the employees were
9 paid in cash prior to that.

10 THE COURT: Okay. Well, that's fine, but for another
11 purpose, it says -- he's saying Peter made that decision.
12 That's a good example, when I say tell me an example of how one
13 supervises, monitors or disciplines, what is the factual
14 evidence of that. If I asked you that about Peter, you would
15 say the factual evidence of that is that the employer said that
16 he knew or I guess it's still somewhat conclusory but at least
17 he's saying that Peter made the decision as to whether to pay
18 the person in check or cash. Now, Peter can either deny or
19 admit that, but you don't make that kind of allegation against
20 Maria.

21 What decision do you say Maria made? What managerial
22 decision did she make?

23 MR. ELLIS: At paragraph 9, Mr. Pineda states again,
24 first, that he was supervised by Maria --

25 THE COURT: What was the supervisory decision that she

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1 made?

2 MR. ELLIS: He goes on to state that she determined
3 his tips.

4 THE COURT: No, it doesn't say that.

5 MR. ELLIS: "Maria would simply give me some amount of
6 the tips but I never knew how much was the total, so I was
7 never able to see." And he would complain to her, so she is
8 the person that he would then complain to about this. And she
9 would tell him to go pound sand, basically.

10 THE COURT: It doesn't say she determined the amount
11 of tips. She handed him his portion of the tips. He said that
12 he questioned her --

13 MR. ELLIS: His testimony is that he was paid by three
14 people -- Peter, Maria and Renato -- and his testimony is that
15 the tips were controlled only by Maria.

16 THE COURT: Where does it say that?

17 MR. ELLIS: In paragraph 9.

18 THE COURT: It doesn't say it was controlled only by
19 Maria.

20 MR. ELLIS: He never said it was controlled by anyone
21 other --

22 THE COURT: No, it doesn't say she controlled the tips
23 at all. It says she would simply give me some amount of the
24 tips. He doesn't say how she got them, it doesn't say whether
25 or not she was the one that divided up the money, it doesn't

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1 say she determined the tips. It says that she handed him what
2 was supposed to be handed to him as his portion of the tip.

3 When he asked her about it, he doesn't say, well,
4 look, I calculated it, I know it's right, you've got nothing to
5 complain about because I did it myself personally and I take
6 responsibility for it, it's my job to determine the tips. She
7 doesn't say any of that. He doesn't even say she has that
8 role. He says she shows up with a portion of the tips. By
9 this scenario, I have a day in time when she shows up with his
10 pay and she gives him an amount of money and that amount of
11 money may be \$80 for his wages and \$20 for his portion of the
12 tips. And she hands that to him and he looks at it and he says
13 you know what, I'm not sure this is right. And she says to
14 him, well, look, I don't know what you're complaining about
15 now. Whether or not this was the right thing to say, she says
16 you shouldn't even work here, so if I were you, I wouldn't
17 complain so much about whether or not you think the tips are
18 right, I would just take your money and be happy you got a job.

19 Okay, that's what I read from this. That doesn't tell
20 me that she's the boss. Anybody could have made that
21 statement. Another busboy could have made that statement.

22 MR. ELLIS: The busboy is not giving her the tips.

23 THE COURT: A busboy could have given her the tips.

24 MR. ELLIS: And if that was the case, that it's
25 another busboy who's giving him his tips and telling him you

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1 should be happy with this amount, then that other busboy is an
2 employer.

3 THE COURT: But you would agree that if he thought
4 that he wasn't getting paid the right amount of pay, that the
5 logical and appropriate thing for them to do would be to go to
6 Renato?

7 MR. ELLIS: No. It would be to go to the person who
8 he believed is determining that amount of pay.

9 THE COURT: But he didn't do that, he didn't do.

10 MR. ELLIS: He says that Maria was my direct
11 supervisor, she determined my tips; when I had a problem with
12 the amount of tips I made, I would go talk to Maria. That's
13 what he's saying.

14 THE COURT: No, it doesn't say when I had a problem.

15 MR. ELLIS: Maria directly supervised me.

16 THE COURT: Right.

17 MR. ELLIS: Maria would simply give me some amount of
18 the tips but I never knew what the total was; when I would tell
19 her about that, I believed my tips were incorrect, she would
20 tell me to be content with what I had been given.

21 THE COURT: Okay, so what about that --

22 MR. ELLIS: That's exactly what an employee does when
23 they have a relationship with an employer who's their
24 supervisor. If I have a problem with my pay, I go to Michael
25 Faillace and I tell him to give me a raise.

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1 THE COURT: It doesn't say he went to her. It says
2 she went to him.

3 MR. ELLIS: No, it says he --

4 THE COURT: No, it says she goes to him and gives him
5 the tips. And when she gives him the tips, he says, well, I
6 don't think this is right, and she says, look, not my problem.
7 That's basically the way I read this.

8 MR. ELLIS: I don't think you read it incorrectly.

9 That's exactly what -- and the fact that coupled with her being
10 an owner of the corporation, an officer of the corporation, and
11 that is her operational control of the corporation's covered
12 enterprise.

13 THE COURT: Well, let me ask you -- because we're
14 going to end this soon -- let me ask you these questions, which
15 would be the most powerful arguments if you had this evidence:
16 So tell me, when I read this evidence, there's no evidence in
17 this record that Maria ever hired a single employee; is that
18 correct?

19 MR. ELLIS: That's correct.

20 THE COURT: There's no evidence in this record that
21 Maria ever fired a single employee.

22 MR. ELLIS: That's correct.

23 THE COURT: There's no evidence in this record that
24 Maria set the salary level for any of these employees.

25 MR. ELLIS: That's correct.

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1 THE COURT: What else is the most powerful indication
2 of -- and there's no evidence in this record that Maria was
3 engaged in certain kinds of functions that would make me
4 conclude that she was supervising Pineda when it seems that she
5 is mostly in the role of a hostess, and I'm not sure what it
6 is --

7 MR. ELLIS: She was not just a hostess -- we can
8 establish that -- she was an owner of the corporation and an
9 officer of it. So this idea that she is just a hostess is
10 hogwash.

11 THE COURT: Look, this is not the determination, but
12 it's clear, as being the daughter of the owner of the
13 establishment and having a corporate ownership herself, that
14 people are going to be hesitant to make her unhappy, okay? I
15 understand that.

16 MR. ELLIS: We're well beyond that, your Honor.

17 THE COURT: No, we're not well beyond that. If we're
18 well beyond that, you'd give me some facts.

19 MR. ELLIS: She's not just some person who happens to
20 be related to the owner, who owns an ownership stake and comes
21 in every Saturday and you've got to make her happy. She's
22 there every day supervising people.

23 THE COURT: No, she's there every day doing work. And
24 without using the word "supervise," tell me what she's there
25 doing.

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1 MR. ELLIS: Telling employees what to do, go bus that
2 table, go bus this table.

3 THE COURT: Where is that in this record? Where does
4 it say this?

5 MR. ELLIS: Mr. Pineda's testimony.

6 THE COURT: Where does it say that he told her to go
7 do this table, go do that table? Where is there any evidence
8 of those kinds of specifics? I assume there isn't.

9 MR. ELLIS: If Mr. Pineda were here --

10 THE COURT: How would you know that?

11 MR. ELLIS: He was never deposed.

12 THE COURT: Well, then that's not evidence that you
13 can argue from. I can't assume he would say that. You don't
14 know that he would say that. He never said that to you.

15 MR. ELLIS: Her role, though, as an employer is in
16 dispute, and there's clearly not enough evidence on this record
17 to say that she was not an employer within the meaning of the
18 FLSA, especially given the fact, again, that she's an owner of
19 the corporation who's there on a daily basis. If --

20 THE COURT: So you want me to say that because she is
21 an owner, a corporate owner, and is working there -- she's not
22 there on a daily basis in her capacity as a corporate owner,
23 she's there on a daily basis in her capacity as a paid
24 employee, right?

25 MR. ELLIS: Both.

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1 THE COURT: Well, no, not both. She's being paid to
2 do the job that she's doing.

3 MR. ELLIS: Right.

4 THE COURT: She's not doing it for free and she's
5 not --

6 MR. ELLIS: She's also not made an owner for free.

7 THE COURT: I know, but being an owner doesn't
8 determine whether you're going to be there on a daily basis.

9 MR. ELLIS: Correct.

10 THE COURT: And in this case, you would have a
11 stronger argument if she was an owner, didn't have a job there,
12 was there on a daily basis to make sure that the restaurant was
13 making money so she could profit from it. She's there in a
14 paid capacity.

15 MR. ELLIS: Yes. But giving her a paycheck, a salary,
16 doesn't somehow absolve her role as an employer.

17 THE COURT: It doesn't, it doesn't, if you can tell me
18 what role she has as an employee.

19 MR. ELLIS: Whether or not she's paid say a salary is
20 completely irrelevant to the analyses of whether she is an FLSA
21 employer. She could be paid a salary, she could not be paid a
22 salary, the salary could be one dollar, a thousand dollars a
23 week. That has no bearing on whether or not she's an employer.

24 THE COURT: So let me ask you, the same way I asked
25 you about hiring, firing, setting the wages --

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1 MR. ELLIS: Operational control, if you will.

2 THE COURT: All right. So tell me what -- well, no,
3 let me take it back. I'm going to say it more firmly. Isn't
4 it true that there's no evidence in this record that she made
5 any particular decision over an employee that you can cite to
6 me as evidence of her alleged supervisory role?

7 MR. ELLIS: No, there is evidence of that.

8 THE COURT: Okay. Give me the evidence of what it is
9 that she did that would support her supervisory role.

10 MR. ELLIS: She was given the authority to pay
11 employees and, according to Mr. Pineda --

12 THE COURT: Wait a minute, wait a minute. Where does
13 it say that?

14 MR. ELLIS: She paid employees.

15 THE COURT: She was given the authority -- so, okay,
16 that's what I anti --

17 MR. ELLIS: Only three people can do this in the
18 corporation. Only three people, according to all the
19 testimony, only three people ever paid employees, and all three
20 of them happened to be corporate owners and officers.

21 THE COURT: Okay. So you're saying that the fact that
22 she handed them their pay is what makes her an employer?

23 MR. ELLIS: It's one of many indicia of her being an
24 employer.

25 THE COURT: And you think that --

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1 MR. ELLIS: Under Irizarry, the question is, does this
2 person have operational control.

3 THE COURT: Right. So what operational control, what
4 is the evidence of her operational control? Give me the fact.
5 What did she do?

6 MR. ELLIS: Before that, let me read the definition
7 from Irizarry of operational control. This would be if his or
8 her role within the company and the decisions it entails
9 directly affect the nature or conditions of the employee's
10 employment.

11 THE COURT: Okay. So tell me, what evidence in this
12 case is there that she made a decision that directly affected
13 the employer?

14 MR. ELLIS: So some degree of individual involvement
15 in the company in a manner that affects employee-related
16 factors, such as workplace conditions and operations, personnel
17 or compensation.

18 THE COURT: Okay. So as to which one of those did she
19 make the decision?

20 MR. ELLIS: Compensation --

21 THE COURT: She made the decision about what the
22 compensation was going to be? There's evidence in this record?

23 MR. ELLIS: No. It says some degree of individual
24 involvement -- it's not the final decision -- some degree --

25 THE COURT: No, no.

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1 MR. ELLIS: -- of individual involvement in a company
2 in a manner that affects --

3 THE COURT: No.

4 MR. ELLIS: -- employment-related factors such as
5 workplace conditions.

6 THE COURT: No. You just read part of the sentence.
7 The sentence started out with "decisions."

8 MR. ELLIS: No, it doesn't.

9 THE COURT: Read it again.

10 MR. ELLIS: Page 5 from my brief.

11 THE COURT: Read what you just read to me. What you
12 read to me, the word you read to me was "decisions."

13 MR. ELLIS: Okay. So the issue is operational
14 control.

15 THE COURT: Right.

16 MR. ELLIS: A defendant exercises such operational
17 control, quote, if his or her role within the company and the
18 decisions it entails --

19 THE COURT: And the decisions it entails.

20 MR. ELLIS: -- directly affect the nature or
21 conditions of the employees employment or if he possesses,
22 quote, some degree of individual involvement in a company in a
23 manner that affects employment-related factors such as
24 workplace conditions and operations, personnel or compensation.

25 THE COURT: Okay. So which one of those factors are

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1 you relying upon?

2 MR. ELLIS: Multiple. First, I would state workplace
3 conditions. She was a supervisor of the front of the house.

4 THE COURT: Give me an example of the workplace
5 condition that she changed.

6 MR. ELLIS: That she changed?

7 THE COURT: Yes. That she made some decision on.

8 MR. ELLIS: Again, we're getting back to this issue of
9 whether or not somebody possesses or exercises these
10 controls --

11 THE COURT: Right, because --

12 MR. ELLIS: -- because possession is enough to get me
13 status as an employer.

14 THE COURT: But you can't argue that she has this if
15 she's not -- if there's no evidence she's exercising this,
16 what's the evidence that she has this control?

17 MR. ELLIS: Oh, no, that is absolutely the way that
18 this area of law functions, your Honor.

19 THE COURT: No, it doesn't, no. This area functions
20 that you have to give me some fact that will establish these
21 factors. I'm asking you which one of these factors you're
22 relying upon, and I'm asking you what facts you're relying upon
23 to argue these factors.

24 MR. ELLIS: I would point to two. First, workplace
25 conditions and operations because --

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1 THE COURT: Wait a minute, because I want to write it
2 down. Okay, workplace --

3 MR. ELLIS: Workplace conditions and operations.

4 THE COURT: Conditions? Wait a minute, that's two
5 different things. Workplace conditions?

6 MR. ELLIS: And operations.

7 THE COURT: And workplace operations.

8 MR. ELLIS: Right.

9 THE COURT: Okay.

10 MR. ELLIS: And compensation would be the other
11 factor.

12 THE COURT: Compensation?

13 MR. ELLIS: Right.

14 THE COURT: And you say --

15 MR. ELLIS: Just back to this distinction between
16 exercise of control and possession of control, because I think
17 this is really key, this is from page 6 of my brief: Fermin
18 versus Las Delicias Peruanas Restaurant, Inc., Eastern District
19 2015, 93 F.Supp.3d 19. "A district court may consider an
20 individual defendant's potential power at a company, i.e., if
21 an individual defendant's lack of operational control is due to
22 the individual defendant choosing not to exercise power he or
23 she possesses."

24 THE COURT: Okay, so --

25 MR. ELLIS: That may also weigh in favor of the

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1 employer status.

2 THE COURT: So tell me what power you say the record
3 indicates that she had that she did not exercise. What
4 potential powers are you trying to urge upon me to conclude?

5 MR. ELLIS: I think all of the powers that -- to hire
6 and fire employees.

7 THE COURT: Wait a minute. Is there a shred of
8 evidence that she had any authority, potential power --

9 MR. ELLIS: Yes.

10 THE COURT: -- to hire and fire employees?

11 MR. ELLIS: Absolutely.

12 THE COURT: What is that evidence?

13 MR. ELLIS: She is an officer of the company.

14 THE COURT: That does not give her the right to hire
15 and fire employees.

16 MR. ELLIS: She is there on a daily basis.

17 THE COURT: That does not give her the right to hire
18 and fire employees.

19 MR. ELLIS: I believe it does.

20 THE COURT: The fact that she's a corporate officer?

21 MR. ELLIS: And --

22 THE COURT: You think the case law is that a corporate
23 officer, you can rely on that --

24 MR. ELLIS: Not alone.

25 THE COURT: -- as evidence of that you have the

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1 authority to hire and fire employees?

2 MR. ELLIS: No, not alone, but in total, I believe
3 that the evidence is very clear that she possessed all of
4 these -- all of this power.

5 THE COURT: Okay. You're lumping them together.
6 You're making your argument weaker not stronger. I'm asking
7 you specifics and you're having difficulty me giving me those
8 specifics.

9 You said she had some sort of involvement in workplace
10 conditions.

11 MR. ELLIS: Right. She was the supervisor --

12 THE COURT: What are the workplace conditions that she
13 affected?

14 MR. ELLIS: She controlled, managed, supervised the
15 front of the house.

16 THE COURT: Tell me what workplace condition that your
17 client was working under that she affected. Give me one
18 example.

19 MR. ELLIS: Again, going back to Mr. Pineda's
20 declaration, I would point to the fact that he was paid
21 regularly by Maria and that she apparently determined his tips.

22 THE COURT: How does giving him his paycheck affect
23 his workplace conditions or the operation?

24 MR. ELLIS: It's a basic part of the employer/employee
25 relation, that one is paid for their work. And how that occurs

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1 is critical. That's the basic function of an employer/employee
2 relationship, and if this is the person who, on behalf of the
3 company, is paying me --

4 THE COURT: That's compensation. You also said you're
5 relying on compensation. Is that your same argument or a
6 different argument?

7 MR. ELLIS: No, I would also point to the tip
8 testimony about the tip pool.

9 THE COURT: Where is the evidence that she determined
10 what percentage of the tip he's supposed to get?

11 MR. ELLIS: Sorry, say that again.

12 THE COURT: What's the evidence that she determined
13 what percentage of the tip pool he was supposed to get?

14 MR. ELLIS: She hasn't been deposed, let alone on
15 this --

16 THE COURT: So there's no evidence that she affected,
17 that she set his compensation, either as to salary or as to
18 tips.

19 MR. ELLIS: That's not correct. This testimony --

20 THE COURT: What is the evidence --

21 MR. ELLIS: That she set the amount of tips that he
22 received.

23 THE COURT: It doesn't say that. It doesn't say she
24 determined the amount -- what does that mean, she determined
25 the amount of tips? She determined what percentage he was

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1 going to get?

2 MR. ELLIS: That's what his testimony is.

3 THE COURT: That's not his testimony.

4 MR. ELLIS: She would give me some amounts of the
5 tips.

6 THE COURT: Where is that testimony? Quote it to me.

7 MR. ELLIS: Again, paragraph 9.

8 THE COURT: Quote me that testimony that stands for
9 that proposition.

10 MR. ELLIS: "Maria would simply give me some amounts
11 of the tips but I never knew how much the total was, so I was
12 never able to see if I was being paid fairly."

13 THE COURT: So what does it say she did, other than
14 give him some amount of money?

15 MR. ELLIS: Exactly. Though --

16 THE COURT: Handing him --

17 MR. ELLIS: As opposed to what? She's determining the
18 percent of tips that he receives. She's determining his
19 compensation.

20 THE COURT: So one last question: What is the
21 evidence, consistent with the argument you make as to Peter,
22 what is the comparable evidence as to Maria with regard to what
23 role she played when Renato was in charge and what role she
24 played after Renato passed away or went to the hospital?

25 MR. ELLIS: Okay, if you take a step back and look at

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1 the undisputed facts in this, the undisputed facts for both of
2 the defendants, Renato and Peter, are remarkably similar, the
3 same, in fact, aside from their different titles as corporate
4 officers. They both began working at the restaurant in 1993;
5 they were both, at the exact same time, given equal shares,
6 ownership shares, of 25 percent each; and they were both made
7 corporate officers at the exact time, in 2006.

8 THE COURT: By their father?

9 MR. ELLIS: Right.

10 THE COURT: And I assume there are no other children?

11 MR. ELLIS: I assume so too, but --

12 THE COURT: He gave children his interest in the
13 restaurant?

14 MR. ELLIS: Right, right, which came from the uncle
15 who was leaving the restaurant.

16 THE COURT: It had been the uncle's share?

17 MR. ELLIS: Right.

18 So if we wanted to look at this and say, well, Peter
19 is more in charge than Maria --

20 THE COURT: You don't agree that Peter is more in
21 charge than Maria?

22 MR. ELLIS: I think that's clear.

23 THE COURT: I would you could think make a credible
24 argument on these facts.

25 MR. ELLIS: No, I think that's true. Again, in terms

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1 of hard facts that we can point to, the only other one that I
2 would point to is that their titles -- he was given the title
3 of vice president and she was given the title of secretary in
4 the corporation.

5 THE COURT: But those are corporate titles, not job
6 titles.

7 MR. ELLIS: Exactly.

8 THE COURT: Did either one of them have a job title?

9 MR. ELLIS: Not to my knowledge, no. They just had
10 roles. You know, basically, Maria was in charge of the front
11 of the house and Peter was the manager.

12 THE COURT: The only thing you told me is that she
13 supervised your plaintiff who was a busboy?

14 MR. ELLIS: Right.

15 THE COURT: Is there any evidence she supervised
16 anyone else?

17 MR. ELLIS: No, because the rest worked in the back of
18 the house.

19 THE COURT: Okay. So how many busboys were there?

20 MR. ELLIS: Unclear from the record.

21 THE COURT: More than one that worked at a time?

22 MR. ELLIS: I believe so, perhaps two, I don't know,
23 and waiters.

24 THE COURT: Is there any evidence that she supervised
25 some other individual other than Pineda?

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1 MR. ELLIS: Yes. Mr. Pineda testified that she
2 supervised waiters and hostesses.

3 THE COURT: Okay. What does that mean? Is there some
4 waiter who said that he was supervised by her?

5 MR. ELLIS: No. This is Mr. Pineda testifying as to
6 the operations --

7 THE COURT: No, I understand that. I'm saying, who
8 did she supervise? There's no other plaintiff who claimed that
9 she was their supervisor.

10 MR. ELLIS: That's correct, because the other
11 plaintiffs worked in the back of the house.

12 THE COURT: So why would she qualify as their
13 employer?

14 MR. ELLIS: Again, as a corporate owner, who is a
15 corporate officer, who is working at the restaurant every day,
16 she was --

17 THE COURT: Yes, but she isn't like any employer --
18 no, her function has to be with regard to these plaintiffs,
19 right?

20 MR. ELLIS: No. If she is --

21 THE COURT: Well, Diaz can't just sue her and sue her
22 as his employer, can he?

23 MR. ELLIS: If he was only suing her and not the
24 corporation?

25 THE COURT: Right. If you're suing her and the

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1 corporation. He doesn't claim that she's his supervisor, even
2 by your argument.

3 MR. ELLIS: Correct.

4 THE COURT: None of these other plaintiffs, other than
5 Pineda -- that's why I asked -- none of these other plaintiffs
6 have standing to sue her as their employer, whether they sue
7 the restaurant or other people or not.

8 MR. ELLIS: Yes, I think that's correct.

9 THE COURT: The only person you're alleging who would
10 have any standing to sue her as their employer is Pineda.

11 MR. ELLIS: Right, fair enough. She still ends up on
12 the hook jointly and severally, though, as an employer --

13 THE COURT: No, not as to the other employees. She's
14 not their employer. She doesn't owe them money.

15 MR. ELLIS: If she is a corporate officer and she is
16 on a daily basis --

17 THE COURT: Supervising only the busboys. If she is
18 only the employer as to the busboys, how can the waiter sue her
19 if she has no supervisory responsibility over waiters?

20 MR. ELLIS: Well, according to this, she supervised
21 waiters and hostesses and busboys, the people who worked in the
22 front of the house --

23 THE COURT: Does Diaz claim that she supervised him?

24 MR. ELLIS: Not to my knowledge.

25 THE COURT: None of the other three, none of those

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1 three, other than Pineda, claim that she supervised them,
2 right?

3 MR. ELLIS: I believe Mr. Guayllasac states that she
4 supervised him.

5 THE COURT: Do you think she's his employer also?
6 What is his job?

7 MR. ELLIS: He was a cook. No, he doesn't he states
8 that -- well --

9 THE COURT: You said she supervised the people in the
10 front. The cook is in the kitchen.

11 MR. ELLIS: Right, yeah. He testifies that she
12 supervised waitresses -- waiters and hostesses and generally --

13 THE COURT: What waiter did she supervise?

14 MR. ELLIS: Oh, he also testified that she would pay
15 him occasionally.

16 THE COURT: Are you arguing that she's his supervisor
17 because she paid him?

18 MR. ELLIS: No. My argument is that she had
19 operational control over the business --

20 THE COURT: Over him?

21 MR. ELLIS: And that -- yes, over all the plaintiffs
22 because of the powers that were vested in her, and that she
23 only occasionally exercised these powers, some of the indicia
24 of this being when she would pay employees, when she would --

25 THE COURT: What is the evidence she was given these

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1 powers, other than that she was a corporate owner? What's the
2 evidence that she was given managerial powers over employees,
3 other than Mr. Pineda's vague statement that she supervised?

4 MR. ELLIS: The payment of employees, I would say, is
5 the only hard evidence we have. And, again, this gets to the
6 only people going around paying employees at Piccolo Angolo are
7 actual corporate owners.

8 THE COURT: You wouldn't argue that would make them
9 employers in and of itself?

10 MR. ELLIS: In and of itself, no, but it's this
11 analysis in toto.

12 THE COURT: Is it your position that Peter had the
13 authority to hire and fire people?

14 MR. ELLIS: Yes, absolutely.

15 THE COURT: But it's not your position that Maria had
16 that authority?

17 MR. ELLIS: No.

18 And with respect to Peter, I would state also that
19 both plaintiffs who submitted declarations testified they were
20 both fired by Peter.

21 THE COURT: Both fired by Peter?

22 MR. ELLIS: Yes.

23 THE COURT: That was after the father died?

24 MR. ELLIS: Yes.

25 THE COURT: What do you say the status was of Peter

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1 and Maria after the father died?

2 MR. ELLIS: As to their corporate ownership or --

3 THE COURT: As to their status as employers.

4 MR. ELLIS: It's our argument that they were employers
5 for the entire time, both of them, that they were FLSA
6 employers for the entire --

7 THE COURT: I know, but Peter's role did change to
8 some extent.

9 MR. ELLIS: Yes.

10 THE COURT: When the father died?

11 MR. ELLIS: Right.

12 THE COURT: You don't claim that Maria's role got
13 significantly different after the father died?

14 MR. ELLIS: No.

15 THE COURT: You don't say it got any different at all?

16 MR. ELLIS: No, for either. And I think --

17 THE COURT: No, no, no, you can't say that. You just
18 said the opposite. You just said Peter's role was
19 significantly different after the father died because the
20 father was no longer around to consult on those decisions, he
21 was making those decisions, right?

22 MR. ELLIS: On this theory of Peter running back and
23 forth to his father's bedside --

24 THE COURT: On any theory.

25 MR. ELLIS: Well, that would have changed, even under

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1 that theory.

2 THE COURT: Right.

3 MR. ELLIS: No, I think in --

4 THE COURT: Peter was clearly the person in charge.
5 He took over the responsibilities as employer once the father
6 died.

7 MR. ELLIS: Right, I think that's --

8 THE COURT: His role went from whatever you want to
9 characterize it as -- whether you had a hierarchy and the
10 father was at the top --

11 MR. ELLIS: Yes.

12 THE COURT: -- that hierarchy didn't exist anymore,
13 Peter was now at the top.

14 MR. ELLIS: Yes, but I think in terms of day to day,
15 the day to day did not change, and that the only thing that
16 changed was his paper hierarchy, with the father at the top.
17 And both plaintiffs testified that the father actually started
18 getting sick in 2011 and that the roles started changing at
19 that point.

20 THE COURT: I know, but there was at least a
21 significant change. There was a change in the fact that Peter,
22 before the father died, whether Peter was making decisions in
23 the father's absence, Peter had the father available to
24 consult.

25 MR. ELLIS: Sure. So did Maria, though.

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1 THE COURT: It is not your position that if the father
2 wanted to do it one way and Peter wanted to do it a different
3 way, that Peter could tell the father, we're going to do it my
4 way? That's not your case before the father died?

5 MR. ELLIS: Correct, yes.

6 THE COURT: As I say, a Godfather analogy, you've got
7 Michael and Vito. He decides, Michael, you're in charge now,
8 you do what you want, that's your theory, and then he dies and
9 then Michael goes out and he does the assassination.

10 MR. ELLIS: Right.

11 THE COURT: That's his decision. I said, I promise,
12 on the lives of my children, that I wouldn't do anything to
13 force him to break the peace.

14 MR. ELLIS: Right, right, right.

15 THE COURT: That's what Vito says. And he wasn't the
16 person to break the peace because he didn't make those
17 decisions when he was in authority to make to make those
18 decisions, and when he transferred power to his son, that
19 decision was ultimately made by his son.

20 MR. ELLIS: I agree. But to go Godfather analogy, I
21 think what you're really talking about is the time when Sonny
22 and Michael -- when Sonny is still alive. And Sonny is Peter
23 and Maria is Michael.

24 THE COURT: Sonny is Peter and Maria is Michael? You
25 know, that's not a bad analogy because you know at that point

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1 in time Michael was in Italy.

2 MR. ELLIS: Right.

3 THE COURT: Michael wasn't in charge.

4 MR. ELLIS: Very much involved in the family business.

5 THE COURT: No, he was not involved in the family
6 business.

7 MR. ELLIS: He had to go to Italy to hire because he
8 had just done the family a great service and he was --

9 THE COURT: Exactly, not as an employer. He decided
10 that he would assassinate --

11 MR. ELLIS: A cop.

12 THE COURT: The cop and whatever his name was.

13 They could have gotten -- I forget all the names now,
14 but if Lugo was still alive, they could have gotten him to kill
15 him, right? That's not an employer task, that's an employee's
16 task, of killing the police officer and killing the -- whoever
17 will going to get the job done, Tessio could have done it,
18 Clemenza could have done it, but the reason Michael did it was
19 not because he was their boss. They were trying to keep him
20 out of this. Michael did it because he was the person who had
21 access to the person to be assassinated.

22 MR. ELLIS: Right. But it was critical family
23 business that needed to be done.

24 THE COURT: That's right. But you wouldn't argue that
25 Michael was everybody's employer at that time when they asked

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1 him to do the hit, you wouldn't be arguing that?

2 MR. ELLIS: Even in the movie, right, that's when
3 Michael crosses the Rubicon and gets involved. And I think
4 that the analogy --

5 THE COURT: No, not running the business. That's the
6 whole --

7 MR. ELLIS: Involved in the business, not running it
8 as the Godfather but being involved. That's when he crosses
9 that Rubicon.

10 THE COURT: No. The only involvement he had was
11 killing these two guys in the restaurant.

12 MR. ELLIS: Exactly.

13 THE COURT: Then he jumped on a boat and went to Italy
14 for a year. He wasn't involved in the business. He was making
15 no decisions.

16 MR. ELLIS: No, he's --

17 THE COURT: Sonny was making all the decisions. He
18 wasn't involved in the business, this is not the appropriate
19 analogy, but he wasn't involved in the business, if you want to
20 throw that analogy at me. If he's Maria, I can't use his
21 activities prior to his father transferring those
22 responsibilities. Sure, at the point when Michael, what's his
23 name, Robert Duvall --

24 MR. ELLIS: The consiglieri?

25 THE COURT: Yes. Whatever his name was in the movie.

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1 -- at the point when he says to the other guys, look,
2 no, I'm not going to talk to the Godfather, Michael's running
3 things, you talk to Michael.

4 MR. ELLIS: That's after he comes back from Italy,
5 right.

6 THE COURT: At that point, yes, he's the employer.
7 But you don't have that status as to Maria; you argue you have
8 that status as Peter.

9 MR. ELLIS: This is, I guess, where the analogies
10 break down. In the Godfather analogy, we have a very
11 hierarchical system where there's no ambiguity, there's one guy
12 in charge, everyone else works for him.

13 THE COURT: There was a hierarchical system. Renato
14 was in charge. You don't argue that anybody had greater
15 authority than Renato?

16 MR. ELLIS: Absolutely.

17 THE COURT: Or had as much authority as Renato?

18 MR. ELLIS: Correct. But where the analogy breaks
19 down is the FLSA and the definition of employer under the FLSA
20 and the fact that it's so broad purposefully.

21 And then, again, back to the Godfather analogy,
22 Michael is involved at the point when he leaves for Italy. His
23 wife is assassinated in Italy by Americans acting --

24 THE COURT: Right, he's involved but he's not involved
25 as an employer.

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1 MR. ELLIS: Yes, he's involved --

2 THE COURT: No, he's not involved as an employer.

3 MR. ELLIS: In the analogy with the FLSA --

4 THE COURT: If you look at all the factors you gave
5 me, there's not a single factor, piece of evidence, that you
6 can point to, even in that analogy, that would show that he set
7 people's compensation. He isn't even delivering checks. Maria
8 is delivering the checks. He's not supervising anybody. He
9 has none of those indicia of being the employer or that you
10 cited under the case law. Your argument betrays you there. If
11 you're going to say that that's --

12 MR. ELLIS: My argument is that he is involved in the
13 family business, is the point where he crosses that Rubicon and
14 assassinates Sollozzo and the cop. And the indicia in the
15 analogy that he is still involved, even in Italy, is that his
16 wife gets assassinated and he comes back and takes over.

17 THE COURT: When he goes back and takes over, then
18 he's involved?

19 MR. ELLIS: Then he's in charge. But he's always
20 involved from the moment he crosses that Rubicon and kills the
21 cop. He's --

22 THE COURT: That's why I asked you specifically in
23 this case, give me the facts that you say the evidence
24 indicates that Maria was involved. You're making that argument
25 as to Michael, and my question would be exactly the same thing:

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1 What evidence is there that Michael was involved in running the
2 family business from Italy? There's absolutely none, none.
3 You can't say because they blew up his wife that's evidence
4 that he is an employer of the people who were working for the
5 Godfather. He's not making those decisions. He's not even
6 talking to these people. They haven't seen him for a year.
7 They're hiding him out somewhere so somebody doesn't kill him.

8 There's no factual evidence that you can give me that
9 I can say, yes, Michael did X so that shows that he was helping
10 to run the family business. There's no such evidence. Until
11 Michael comes back, his father gets out of the hospital, and
12 he's sitting down with his father, his father is passing on
13 those responsibilities to him. There's no such evidence before
14 that.

15 So here I understand your argument about Peter, I
16 understand, although it's very vague and I think it's an
17 evidentiary issue as to how involved Peter was, when he got so
18 involved that he at some point became an employer or wasn't the
19 employer, was he the employer all along, was he the employer
20 only when his father got sick, only after his father died.
21 Those are all factual issues that I think on this record I
22 don't have a basis to resolve. Those have to be resolved on
23 credibility issues and testimony of witnesses.

24 With regard to Maria, I don't see such a transition.
25 You're saying to me that you've got one plaintiff, who's the

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1 busboy, who simply says, Maria used to supervise me, she gave
2 me my check, she gave me the pay and the pay included my wages
3 and my tips, and I complained to her when she gave me the tips,
4 that I thought I wasn't getting my whole tips, and she told me
5 to just take it, she wasn't do anything about it.

6 MR. ELLIS: You also have a cook testifying he was
7 paid by Maria.

8 THE COURT: Okay. But you're not arguing that she's
9 his supervisor. You told me she wasn't his supervisor.

10 MR. ELLIS: On a daily basis.

11 THE COURT: On any basis.

12 MR. ELLIS: Well, aside from paying.

13 THE COURT: I know, but you're not arguing from that
14 that she's the cook's employer, are you?

15 MR. ELLIS: Yes, because I'm saying that the act of
16 paying is a supervisory act. The act of distributing paychecks
17 is the act of an employer.

18 THE COURT: So even though she had, as you said to me,
19 conceded to me, that she only, even on your theory, that she
20 only supervised the people in the front of the restaurant, you
21 said to me she didn't supervise the cooks, in essence?

22 MR. ELLIS: Right.

23 THE COURT: She doesn't have any decision-making over
24 what goes on in the kitchen. Is that about right?

25 MR. ELLIS: I think so, yes, based on the record, yes.

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1 THE COURT: So you're saying to me that I should
2 determine that she is the cook's employer because she also gave
3 the cook his paycheck? That's your argument?

4 MR. ELLIS: That is an act of operational control
5 under Irizarry that the Second Circuit has laid out, and that
6 that test is very broad. It doesn't have to be supervision
7 like on a daily basis.

8 THE COURT: You said two different things to me.
9 You're now arguing that she is the employer of the cook.

10 MR. ELLIS: Yes.

11 THE COURT: But you conceded before that she wasn't
12 the cook's employer?

13 MR. ELLIS: No. I conceded she didn't supervise him.

14 THE COURT: She didn't supervise him, she didn't set
15 his wages, she didn't have the authority to hire and fire
16 him --

17 MR. ELLIS: I won't concede any of that.

18 THE COURT: Well, you concede there's no evidence in
19 this record.

20 MR. ELLIS: Yes, and I concede she did not directly
21 supervise the cook. He doesn't testify to that.

22 THE COURT: The only evidence in this record on which
23 you want me to determine that she is the cook's employer is the
24 fact that there's some evidence that she gave the cook his
25 paycheck.

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1 MR. ELLIS: Right. And that in conjunction with the
2 fact that she is a corporate owner, officer, on a daily basis
3 there supervising work conditions, including how, when, how
4 much people are paid, that all --

5 THE COURT: But not of the cook?

6 MR. ELLIS: Yes, how, at least how and when he is
7 paid, she determines that.

8 THE COURT: Where does it say that? Where does it say
9 how and when he's paid?

10 MR. ELLIS: She's the one giving the paycheck.

11 THE COURT: But that --

12 MR. ELLIS: That's definitely a "when."

13 THE COURT: My secretary hands me my paycheck. That
14 doesn't make her my employer.

15 MR. ELLIS: But your secretary is not an owner of your
16 enterprise.

17 THE COURT: The President of The United States can
18 hand me my check but that doesn't make him my employer.

19 MR. ELLIS: Right.

20 THE COURT: That theory I don't understand. I don't
21 understand how you can make a credible argument that even
22 though she has no supervisory responsibilities whatsoever over
23 the cook, that simply because she gives him his paycheck, that
24 makes her --

25 MR. ELLIS: I don't think it does. I think we're too

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1 much in the weeds.

2 THE COURT: Well, those are the weeds. You're saying
3 to me that she's his employer.

4 MR. ELLIS: Yes, those are the weeds but the bigger
5 picture is whether or not she even possesses this power in the
6 first place.

7 THE COURT: But what is the evidence --

8 MR. ELLIS: As to if she exercises it --

9 THE COURT: Which power?

10 MR. ELLIS: All of the powers --

11 THE COURT: Which power over the cooks?

12 MR. ELLIS: The powers to hire and fire --

13 THE COURT: What evidence is there that she possesses
14 the power to hire and fire the cook? What is the evidence?

15 MR. ELLIS: She is the owner of the corporation, who
16 is an officer, who is there on a daily basis supervising --

17 THE COURT: That doesn't give her authority,
18 circumstantially or directly, give her that authority, right?

19 MR. ELLIS: True, but on this record, circumstantially
20 and indirectly, what is established is that she has the power
21 to hire and fire people who work in the front of the house.

22 THE COURT: What is the evidence she has the authority
23 it hire and fire somebody in the front office when she has
24 never done that?

25 MR. ELLIS: Just because she never exercises control

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1 doesn't mean she doesn't possess that authority.

2 THE COURT: So that would be clear evidence that she
3 has such evidence.

4 MR. ELLIS: Right.

5 THE COURT: What is the evidence that she has such
6 authority? Simply because she's a corporate owner and works
7 there?

8 MR. ELLIS: And Mr. Pineda's testimony that she
9 supervised him throughout his employment and that she
10 determined his tips.

11 THE COURT: So, there are two periods of time, up
12 until the father died and after the father died. Who do you
13 say -- and then we'll be done -- who do you say had the
14 authority to hire and fire?

15 MR. ELLIS: I believe that all three -- Maria, Peter
16 and Renato -- had the authority to hire and fire people
17 throughout the statute of limitations period.

18 THE COURT: And you have no evidence that at any point
19 in time during this period that anyone hired or fired an
20 employee other than Renato until Renato died, right? And then,
21 when Renato died, the plaintiffs contend that they got into an
22 argument or fight with Peter and Peter subsequently fired some
23 individuals after Renato died?

24 MR. ELLIS: Right, that's correct.

25 THE COURT: But while Renato was alive, he was the

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1 only person that ever hired or fired an individual, right?

2 MR. ELLIS: To my knowledge, yes.

3 THE COURT: On this record?

4 MR. ELLIS: Yes.

5 THE COURT: And after Renato died, Peter was the only
6 person who hired or fired employees after Renato died?

7 MR. ELLIS: Yes, I believe that's the case.

8 THE COURT: Okay.

9 MR. ELLIS: But -- again, this is not my motion --
10 they're asking to you conclude, based on this record, that
11 Maria didn't even possess any of these powers, that she --

12 THE COURT: And she doesn't possess them unless you
13 can show me someplace in the record that you're going to offer
14 some evidence that she does possess them. And your argument
15 that she's simply a corporate owner, that she works there and
16 she hands them their checks is not enough to make her the
17 employer.

18 MR. ELLIS: Absence of evidence is not evidence of
19 absence. The fact that she didn't do these things doesn't mean
20 that she couldn't do these things.

21 THE COURT: Well, that's like saying, well, she had
22 the authority to tear down the building. I'm not going to
23 assume she had that authority unless there's some evidence that
24 she had that authority. There's no evidence that she had the
25 authority. You can't rely on the fact that she's the employer

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1 because she had the power to hire and fire people unless
2 there's evidence in the record that she has the power to hire
3 and fire. How are you going to prove that?

4 MR. ELLIS: Well, first of all, again, this is not my
5 motion --

6 THE COURT: No. How are you going to prove that to a
7 jury? How are you going to prove that to a trier of fact, that
8 she is the employer based on the power that she possessed?
9 When did she obtain this power? If she never exercised it,
10 when do you claim she obtained it?

11 MR. ELLIS: Probably at the point when she became an
12 owner, a 25 percent owner, in the corporation.

13 THE COURT: And you don't claim that anybody discussed
14 this with her, you don't claim that anybody gave her that
15 power.

16 MR. ELLIS: I have no idea what those discussions
17 were. This would be something that we would need -- and this
18 gets exactly at why their summary judgment motion should fail.
19 We need to establish all of this based on testimony.

20 THE COURT: But aren't we finished with discovery?

21 MR. ELLIS: Yes.

22 THE COURT: So whatever you're going to present on
23 this issue should be in this record. I'm asking you where in
24 the record it is. We're not going to start all over again and
25 try to figure out if we can make her the employer. Either the

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1 evidence demonstrates she is or she isn't. And if your
2 argument is that she's the employer because even though she's
3 never exercised any of these powers at any point in time, you
4 say that she does have them, I want to know how they arose,
5 when she got them, and what's the evidence that I can conclude
6 that she had these powers.

7 MR. ELLIS: I think that evidence is clear. She was a
8 corporate officer, who was an owner, who works there on a daily
9 basis supervising employees. It doesn't get more clear.

10 THE COURT: It does get more clear. It could be
11 clearer if somebody gave her that authority. It could be
12 clearer if she had ever exercised that authority. And the
13 scenario you just gave me, that person might have such
14 authority or that person might not have such authority. It
15 doesn't tell me whether they have such authority. It doesn't
16 give you a basis to argue that the facts indicate that she had
17 such authority. That's what you're saying to me, that simply
18 because she's a corporate owner and she works there and she
19 hands them their checks and somehow, quote, supervises a
20 busboy, that's it.

21 MR. ELLIS: And determines his pay --

22 THE COURT: No, it doesn't say --

23 MR. ELLIS: -- by way of his tips.

24 THE COURT: It does not say she determines the pay.
25 That is not an accurate characterization of this evidence.

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1 Nowhere in this record have you pointed me to that says that
2 she calculated or determined the amount of his pay.

3 MR. ELLIS: With all due respect, sir, "Maria would
4 simply give me some amount of the tips but I never knew how
5 much the total was so I was never able to see if I was being
6 paid" --

7 THE COURT: Where does that say that she determined
8 what amount to give him?

9 MR. ELLIS: "Maria would simply give me some amount of
10 the tips."

11 THE COURT: Right. She gave him \$20 and said, this is
12 your portion of the tips?

13 MR. ELLIS: Right.

14 THE COURT: Where does that say that she was the one
15 that calculated that or set the formula or could guarantee that
16 that was right because she personally did it? It says she gave
17 him the money.

18 MR. ELLIS: That is absolutely implied because he goes
19 and complains to her and she tells him --

20 THE COURT: No, he doesn't go anywhere. It doesn't
21 say he goes anywhere. It says she gave him the money and he
22 complained.

23 MR. ELLIS: Right.

24 THE COURT: It doesn't say he went anywhere. He
25 didn't go to Peter, he didn't go to Renato.

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1 MR. ELLIS: He goes to her.

2 THE COURT: She's standing right there giving him the
3 money, and he says, well, I don't think this is enough.

4 MR. ELLIS: And she says, deal with it because she has
5 the authority to say deal with it.

6 THE COURT: Even if she was another busboy, she would
7 have the authority to deal with it.

8 MR. ELLIS: If that's the case, then that other busboy
9 is an employer.

10 THE COURT: Because they said, look, this is the
11 amount of money they told me to give you, that's the amount of
12 money I gave you, that's it, deal with it?

13 MR. ELLIS: But that's not what she's saying. She's
14 saying, "this is what you get," not "this is what was given to
15 me to give you"; "this is what you get, deal with it."

16 THE COURT: That still doesn't tell me that she is the
17 one that calculated that amount of money. You don't have any
18 deposition testimony anything that supports that statement.
19 That's a speculation. That's an inference you want from this.
20 But come on. As you say, you find yourself in a situation
21 where you haven't deposed any of these people. I've got no
22 facts from which I'm supposed to infer that somehow she's the
23 one sitting down calculating the tips. You want me to say this
24 record indicates that she's the person who calculates the tips
25 for all employees? Or for just the busboy?

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1 MR. ELLIS: At least just for the busboy. The record
2 does indicate that she determines his tips.

3 THE COURT: All right, okay.

4 Did you have anything further?

5 MR. KUBLANOVSKY: Your Honor, just one minute, just to
6 clarify some things on the record.

7 In Peter's affidavit as well as Maria's, it states
8 pretty clearly they did not work there daily; they worked there
9 for eight hours a day, five days a week, before their father
10 died. I just want to be clear especially as to Maria because
11 she was not there and she was only there for a limited period.
12 She continues to work there only eight hours per day. It's
13 important because she wasn't there to set up or to pay people
14 or afterwards to clean up except for a couple minutes. She
15 wasn't there to pay people.

16 The other point I want to make is, there is one
17 affidavit from the only waiter and the only other person that
18 worked in front of the house, and that's Mr. Ortiz, who says in
19 his affidavit that neither he nor any of the plaintiffs ever
20 reported to -- "neither I nor any of the plaintiffs ever
21 reported to, or took direction from, either Peter Migliorini or
22 Maria Migliorini Cintron." And he continues to say that,
23 "Renato Migliorini was our one and only boss after
24 February 2005 and until he died in April 2015.

25 He concludes by stating that -- and this is one of the

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1 other factual points I wanted to correct in the record -- that
2 contrary to the statement in plaintiffs' declarations, Renato
3 Migliorini did not fall ill in 2011; in fact, he did not become
4 ill until in or around March 2014. So it was only about a
5 month before he passed away that he was in the hospital, but
6 that notwithstanding the illness, Renato Migliorini continued
7 to manage all aspects of the restaurant, "including supervising
8 me and all the other employees, including plaintiffs, Peter
9 Migliorini and Maria Migliorini Cintron at the restaurant and
10 was responsible for, among other things, paying us our wages."

11 That's all, your Honor.

12 THE COURT: All right. This is what I'm going to do:
13 With regard to Costanzo, I think the plaintiff has
14 appropriately withdrawn and conceded Costanzo is not an
15 employer under the standard here. I don't think there's any
16 allegations that would put Costanzo in that category.

17 Peter, Maria are the ones that basically worked at the
18 restaurant. Clearly, Peter is an employer for some period of
19 time and he's an employer appropriate to be sued by the
20 plaintiffs. There's a real argument, a credible argument, that
21 if Peter was not the employer after the father died -- whether
22 or not the evidence will establish exactly whether he was the
23 employer for the entire period of time or was just an employer
24 for just some portion of that time, I think that's not an issue
25 for summary judgment, that's an evidentiary issue, and that's

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1 an issue that should be determined by the extent of the
2 evidence of his activities and the nature of his activities pre
3 and post his father's illness and death.

4 So I am going to deny the motion to dismiss Peter from
5 this case as an employer because it clearly indicates that he
6 is appropriately sued in some capacity for at least some period
7 of time, if not the total period of time, as an employer of the
8 plaintiffs.

9 With regard to Maria, there is obviously at least an
10 argument to be made over the argument made on Costanzo, that
11 Maria is somehow, because she's an owner and because at least
12 one or certain individuals claimed she somehow supervised them.
13 I find, with the other factors that were argued, that it does
14 not rise to the level of a determination on this record that
15 Maria was in such a role as being the employer of any of these
16 plaintiffs to be sued as the employer.

17 As you've indicated, I'm not sure there's any role
18 that she played that would qualify her as an employer of any --
19 an argument to be made with regard to any plaintiff other than
20 Mr. Pineda, who was a busboy, but there's no evidence in this
21 record that she played any particular roles or facts that
22 indicate that would support a conclusion that she was an
23 employer because besides the fact that she was an owner and
24 worked at the restaurant and was paid to work at the
25 restaurant, that somehow she had the authority to fire and

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1 hire, set wages, that she ever did this activity, was ever
2 given any of that authority or ever implicitly had that
3 authority. None of the plaintiffs even argue or testify or
4 assert in their affidavits that she had such authority or what
5 the basis would be to conclude that she had such authority.

6 I think it is not a sufficient argument to make, that
7 simply because she was a corporate owner and worked at the
8 restaurant and somehow, in some unspecified way, supervised a
9 busboy and maybe one or two others, and that she handed out the
10 checks, that that somehow makes her the employer of -- it
11 doesn't make her an employer of the cooks or other kitchen
12 people who, the evidence is, the record seems to be undisputed,
13 that she exercised such authority over them. The only argument
14 is that the front of the restaurant people -- I'm not even sure
15 it includes waiters but I'll assume that even if it includes
16 waiters and busboys, there's no evidence in here in this record
17 whatsoever from which one could conclude that she had the
18 status of employer in the conduct of her control over these
19 employees, not setting any wages, there's no evidence she set
20 their wages, no evidence she hired them, there's no evidence
21 that she fired them, there's no evidence that she set their
22 hours, which is all the classic indicia of who is the employer,
23 there's no evidence that she disciplined any employees, there's
24 just no factual basis on which argument could be made at this
25 stage of the proceedings, after close of discovery, that would

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warrant a reasonable conclusion that somehow she either exercised this kind of employer authority or that she had such employer authority somehow given to her or somehow obtained, that the evidence indicates that she had but she just declined to use it. I don't think that those are compelling arguments in this case.

I think that as to Peter as an individual, obviously, after their father's death, he took over the role as the employer, which is indicated by the fact that he fired people after that, and there's some evidence that a reasonable jury could conclude that he had enough responsibility and managerial supervisory control over the employees, even when his father was alive, ill or not ill, that might make him liable personally as the employer even during this period of time but that's an issue to be resolved. I'm happy to resolve on summary judgment matters that are appropriate for summary judgment. If the summary judgment motion is to dismiss him as an employer being sued by the plaintiffs as their employer -- he was clearly their employer at some portion of the relevant time period.

So he stays in the case, but as to Maria, the record is void of any evidence on which one could conclude that she was an employer. And, in fact, any evidence that is in the record is evidence of lack of employer status or, as I say, you look at the classic indicia of employers, the type of authority

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1 they would exercise, and when you contrast obviously Maria to
2 Peter to Renato, it is clear that Renato clearly had all of
3 that authority, Peter had at least some of that authority or
4 all of that authority for a portion of the time, if not the
5 total time, and when you look at Maria, there's no indication
6 that her role in that regard was a significant indication of
7 being an employer, nor any indication that her role at any
8 point in time changed or she exercised greater authority either
9 when her father got sick, as it's clear that Peter exercised
10 greater authority when his father was sick, or exercised any
11 greater authority when her father died, as a contrast to Peter
12 who exercised greater authority and total authority.

13 The evidence is very clear that Peter, after his
14 father's death, is pretty much exercising the entire authority
15 as the employer. There's no evidence that Maria is taking a
16 greater role, a different role, during any period of time, and
17 there's no indication that she took an active role in taking on
18 the responsibilities or decision-making of the employer during
19 the period of time that her father was clearly alive and in
20 charge and during the period of time that her brother was
21 substituted for the father, working with the father, or took
22 over full responsibility after the father's death.

23 So, for those reasons, I'm going to issue the order to
24 dismiss Costanzo from the case as a defendant personally; I'm
25 going to deny the motion to dismiss Peter as a defendant in

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1 this case being sued by the plaintiffs; and I will issue an
2 order dismissing Maria as a defendant, as there's no evidence
3 to conclude that Maria was the employer of any of these
4 plaintiffs. That's the order of the Court.

5 Where are we going from here?

6 MR. KUBLANOVSKY: I believe, your Honor, we're
7 probably going to need a pretrial conference at this point.

8 THE COURT: I need a pretrial conference, joint
9 pretrial order, and then a trial date. So let's work
10 backwards.

11 What month would you like to try this?

12 MR. ELLIS: March, your Honor.

13 THE COURT: Okay. So can we do March 13th?
14 March 13th is the trial date. Let's say February 28th as a
15 conference, pretrial conference. If you're going to have any
16 motions in limine, why don't you give them to me by the 3rd of
17 February so they can be responded to within two weeks and I can
18 look at them before the 28th and resolve as many issues as
19 possible.

20 Let's have a joint pretrial order, just give it to me
21 by the 23rd so I can at least take a quick look at it before we
22 have the conference, and we'll be ready for trial on the 13th
23 if we're going to trial.

24 If you want the assistance of the magistrate or
25 mediation for settlement discussions before, just let me know,

H13KFRIM

1 but otherwise we'll set it on that schedule so we can move
2 forward with trial on March 13th.

3 I'll see you on the 28th, let's say, at 10:00 o'clock.

4 MR. ELLIS: Very good. Thank you, your Honor.

5 MR. KUBLANOVSKY: Thank you, your Honor.

6 THE COURT: Thank you.

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